DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1115
Title: Javier Cavazos, Acting Warden, Petitioner
v.
Shirley Ree Smith
Docketed: March 11, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-55831)
Decision Date: October 29, 2010
Rehearing Denied: December 10, 2010

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
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Apr 7 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Apr 19 2011	DISTRIBUTED for Conference of May 12, 2011.
Apr 20 2011	Reply of petitioner Javier Cavazos, Acting Warden filed. (Distributed)
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Oct 31 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 31 2011	Judgment REVERSED and case REMANDED Justice Ginsburg filed a dissenting opinion in which Justice Breyer and Justice Sotomayor join. Opinion per curiam. (Detached Opinion)
Nov 17 2011	Petition for Rehearing filed.
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PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED

No. 10-1115

MAR 9 - 2011

OFFICE OF THE CLERK

In the Supreme Court of the United States

JAVIER CAVAZOS, *Petitioner*,

v.

SHIRLEY REE SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

In respondent's state trial for causing the death of an infant, prosecution and defense experts disagreed on whether the baby died from shaking. After the jury convicted respondent, the Ninth Circuit Court of Appeals in federal habeas corpus proceedings held that there was insufficient evidence to support the conviction and that the state appellate court had "unreasonably" applied *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), in upholding it.

This Court vacated the decision and remanded the case for further consideration in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006). On remand, the Ninth Circuit reinstated its earlier opinion as "unaffected by *Musladin*." This Court again vacated the Ninth Circuit judgment and remanded for further consideration in light of *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), which had also reversed a Ninth Circuit grant of habeas relief where expert opinion testimony was in conflict. On remand, the Ninth Circuit again reinstated its earlier opinion, finding "that nothing in *Brown* is inconsistent with our prior decision or our method of reaching it."

The question presented is:

Did the Ninth Circuit on second remand from this Court exceed its authority under the deferential standard for habeas corpus review in 28 U.S.C. § 2254(d) by granting relief for insufficient evidence based on its acceptance of the cause-of-death testimony of defense experts over the contrary opinion testimony of prosecution experts?

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PETITION FOR WRIT OF CERTIORARI

Javier Cavazos, Acting Warden, Central California Women's Facility, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reinstated its original decision granting habeas corpus relief to respondent following her criminal conviction for the "shaken baby" death of seven-week-old Etzel Glass, after this Court had granted the Warden's previous two petitions for certiorari, vacated the decisions granting relief, and remanded for further consideration in light of *Carey* v. *Musladin*, 549 U.S. 70 (2006), and *McDaniel* v. *Brown*, 558 U.S. ___, 130 S. Ct. 665 (2010), respectively. *Patrick* v. *Smith*, 550 U.S. 915 (2007); *Patrick* v. *Smith*, 130 S. Ct. 1134 (2010).

OPINIONS AND JUDGMENTS BELOW

The second post-remand order of the Ninth Circuit reinstating its original judgment and opinion is reported at 624 F.3d 1235 (9th Cir. 2010). The Ninth Circuit's order denying the petition for panel and en banc rehearing is unreported.

The first post-remand order of the Ninth Circuit reinstating its original judgment and opinion is reported at 508 F.3d 1256 (9th Cir. 2007). The Ninth Circuit's order denying the petition for panel and en banc rehearing is reported at 519 F.3d 900 (9th Cir. 2008).

The original opinion of the Ninth Circuit reversing the judgment of the district court and remanding with instructions to grant respondent's petition for writ of habeas corpus is reported at 437 F.3d 884 (9th Cir. 2006). The order denying the Warden's petition for rehearing and suggestion for rehearing en banc is

reported at 453 F.3d 1203 (9th Cir. 2006). The judgment of the district court denying habeas corpus relief is unreported. The opinion of the California Court of Appeal affirming the judgment, and the California Supreme Court's order denying discretionary review, are unpublished.

Each of these orders and opinions is reproduced in the Appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

JURISDICTION

The post-remand opinion of the Ninth Circuit was filed on October 29, 2010. App. B; *Smith* v. *Mitchell*, 624 F.3d 1235 (9th Cir. 2010). The denial of the Warden's petition for panel and en banc rehearing was filed on December 10, 2010. App. A. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. *State Criminal Proceedings*

Respondent Smith was charged with inflicting corporal injury that caused the death of her seven-week-old grandson, Etzel. (See Cal. Penal Code § 273ab). At her trial, the prosecution produced evidence that, on November 29, 1996, respondent, her daughter Tomeka, and Etzel were staying at the home of respondent's sister. When Etzel's mother put him to sleep at about 11:30 p.m., he appeared healthy. During the night, respondent brought Etzel to his mother, who was asleep in another room. He was quiet and limp, and mucous was coming from his nose. At the direction of 911 operators, Etzel's mother attempted CPR. But, when paramedics arrived at 3:36 a.m., Etzel was not breathing and had no pulse. The baby was pronounced dead at the hospital.

Respondent seemed apprehensive to the firefighter who first arrived at the scene. At first, respondent told her daughter that Etzel had fallen off the sofa earlier in the night and that she had picked him up and rocked him to sleep. One week later, however, respondent told a social worker that, when she woke up after 3 a.m. and checked Etzel, he had not responded to her touch. When she picked him up, she said, his head "flopped back." Respondent explained to the social worker that, at that point, she gave Etzel "a little shake, a jostle" to awaken him. Respondent demonstrated the shaking as a smooth rather than jerky motion. But, respondent said, Etzel still failed to respond. When the social worker asked what happened next, respondent said, "Oh, my God. Did I do it? Did I do it? Oh, my God." At that, respondent's daughter turned to her and said, "If it

wasn't for you, this wouldn't have happened." Respondent did not reply.

In a later interview with police, respondent stated that, when she woke up after 3 a.m., she noticed that Etzel's diaper needed changing. She said she picked Etzel up and saw that he had vomit around his mouth and that his head was "flopped back." Etzel was not breathing and did not move. Respondent told the police that she "shook" Etzel, but then corrected herself to say that she had "twisted" him back and forth to try to get a response. In her interview with the police, respondent denied telling the social worker that she had "shaken" Etzel.

Three Board-certified prosecution experts [1] rendered opinions, based on the autopsy findings of recent trauma, that Etzel had died from violent shaking characteristic of Shaken Baby Syndrome.[2] They found physical evidence of recent trauma to the brain, including bleeding at the top of the brain caused by tearing of blood vessels in that area. In the absence of any external injury to the head that otherwise could account for such trauma, the prosecution experts concluded that a rotational or whiplash-like shaking caused the tearing and bleeding.

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[1] In California, a physician is Board-certified after practicing a certain number of years in the field of specialty that the given Board regulates, passing written tests administered by the experts of the Board, and successfully sitting for an oral examination by a group of Board-certified specialists.

[2] Shaken Baby Syndrome is also known as Shaken Infant Syndrome or SIS, and is the term used in this petition to avoid confusion with Sudden Infant Death Syndrome or SIDS.

The prosecution experts also testified that the shaking was so violent that Etzel's death occurred very quickly, closing down his circulation so that some other potential effects of the trauma, such as swelling in the brain tissue, did not have time to develop. Their diagnosis of Shaken Baby Syndrome was based on the injuries identified during the autopsy.

One of the prosecution's expert witnesses. Dr. Stephanie Erlich—who at the time of the autopsy was Board-certified in anatomic pathology, clinical pathology and neuropathology—testified that death by the shaking characteristic of Shaken Baby Syndrome can occur in three main ways. First, the shaking can cause a massive subdural hemorrhage so that the bleeding will eventually build up enough pressure to damage the brain stem. Second, the shaking can cause massive swelling of the brain, which can result in compression of the brain stem. And, third, the shaking can cause direct trauma to the vital centers of the brain which control the functioning of the heart-and breathing, leading to a very rapid death. In Dr. Erlich's opinion, Etzel's death was caused by the third process: he was shaken so violently that the vital centers of his brain were directly damaged, causing his heart and breathing to shut down.

Dr. Erlich found several independent signs of recent trauma during the autopsy on Etzel's body: fresh blood, measuring one or two tablespoons, on the top of the brain; a fresh blood clot between the hemispheres of the brain; recent hemorrhaging around the optic nerves; a small quantity of fresh subarachnoid blood; and a small bruise and recent abrasion at the lower-back part of the infant's head. These indicators, together with the absence of

evidence of hemorrhaging or swelling and the absence of evidence of any external injury that might have caused death, supported Dr. Erlich's conclusion that the infant was violently shaken in a way that resulted in a very rapid death.

Dr. Erlich also testified that, although retinal bleeding is found in seventy-five to eighty percent of Shaken Baby Syndrome cases, its absence in this case did not rule out her diagnosis. When asked about other possible causes of death, Dr. Erlich testified that Etzel's injuries could not have been caused by improperly administered CPR, or a fall from a couch to a carpeted floor, or smothering.

A second prosecution expert, Dr. Eugene Carpenter—a supervisor who participated in the autopsy and was Board-certified in forensic, anatomic and clinical pathology—also testified that death by violent shaking can be caused in three ways: massive bleeding that can crush the brain stem, massive swelling of the brain, or a sudden violent shaking that destroys the vital centers in the brain and results in rapid death. Dr. Carpenter opined that Etzel's death had been caused by the third process, and he also identified the observable physical evidence supporting his opinion. He found that the bleeding at the top of the brain was caused by tearing of the blood vessels in that area. Also, there was no evidence of any external trauma that could have caused this tearing. In the absence of such evidence, and in conjunction with the other evidence of internal injury to the brain, Dr. Carpenter found that the bleeding on top of the infant's brain was caused by violent shaking, resembling "a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the

chest repeatedly so that the vessels on top of the brain tore."

In addition, the subdural blood, the subarachnoid blood, and the blood around the optic nerves together showed "violent trauma to the head sufficient to cause the death of the infant." He added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Based on these observable findings, Dr. Carpenter testified that the shaking that caused Etzel's death was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death."

Dr. Carpenter also considered other possible causes of death but found that none of them accounted for the trauma seen in the autopsy. He ruled out death from Sudden Infant Death Syndrome because of the presence of internal trauma, the abrasion of the back of Etzel's head, and the bruise underneath the abrasion. If a child's death is due to Sudden Infant Death Syndrome, there are no such signs of trauma. Dr. Carpenter also testified that, although retinal hemorrhages are often seen in the bodies of victims of Shaken Baby Syndrome, and none were found in the autopsy of Etzel, Shaken Baby Syndrome was not thereby ruled out.

Finally, Dr. David Chadwick—Board-certified in pediatrics and the author of scholarly articles on distinguishing childhood death by falls from death by abusive injury—also opined that Etzel had died from injuries characteristic of Shaken Baby Syndrome. He agreed that the evidence observable on autopsy showed that the shaking caused direct trauma to the vital centers of the brain, causing rapid death. He also testified that "old" trauma found during the autopsy had not been the cause of Etzel's death

because there was no sign of the necessary specific pathology to link it to the infant's death. In particular, there was no evidence that an old injury had "re-bled."

In her defense case, respondent presented two doctors to challenge the opinions of the prosecution's three experts. Dr. William Goldie, who was not Board-certified, opined that the cause of Etzel's death was Sudden Infant Death Syndrome. He testified that death characterized by Shaken Baby Syndrome can be due to only two possible causes, either massive swelling of the brain or massive bleeding to the brain. Since neither was detected in Etzel, Dr. Goldie ruled out Shaken Baby Syndrome. In Dr. Goldie's opinion, there was no evidence at all that Etzel's death was due to trauma.

Dr. Richard Siegler, who was Board-certified only in anatomic pathology, did not agree with Dr. Goldie that the death was due to Sudden Infant Death Syndrome. Instead, he agreed with the prosecution experts that the death indeed was caused by traumatic brain injury. But he opined that the death had resulted from an injury occurring prior to the night of Etzel's death that had "re-bled," despite the absence of hemorrhaging or swelling during the autopsy. Dr. Siegler ruled out Shaken Baby Syndrome because of the absence of retinal hemorrhaging. On cross-examination, however, Dr. Siegler acknowledged that retinal hemorrhaging was not found in all shaken-baby cases.

Contrary to the prosecution experts, Dr. Siegler opined that death by Shaken Baby Syndrome can be caused in only two ways, either by massive bleeding or massive swelling. He disagreed with the prosecution experts' opinion that the death had been caused by direct, recent damage to the brain. In his

opinion, the prosecution experts' testimony regarding the cause of death was "a fantasy." Although he acknowledged on cross-examination that the prosecution experts' opinion as to cause of death was "possible," he testified that there was "no way to confirm it or deny it."

Respondent was found guilty as charged. The court sentenced her to prison for a term of 15 years to life.

On direct review, the California Court of Appeal rejected respondent's claim that the evidence of cause of death was insufficient as a matter of constitutional law under *People* v. *Bolin*, 18 Cal. 4th 297, 331, 75 Cal. Rptr. 2d 412 (1998) (applying the *Jackson* v. *Virginia* standard). In response to this claim, the state court presented a lengthy and meticulously detailed summary of the trial evidence, with special emphasis on the testimony of the expert witnesses for both sides. App. K at 80-86. The court concluded that the

> expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from shaken baby syndrome. The conviction is supported by substantial evidence.

App. K at 86. The California Supreme Court denied discretionary review. App. J.

2. *Federal Habeas Corpus Proceedings*

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. She again claimed that her conviction violated due process because the

evidence of the cause of death was constitutionally insufficient. The magistrate judge presented a careful summary of the evidence in what he termed "this tragic case." Applying the deferential review standard of 28 U.S.C. § 2254(d)(1), the magistrate judge recommended that the claim be denied with prejudice because the California Court of Appeal's rejection of respondent's claim had been neither contrary to, nor an unreasonable application of, this Court's precedents of *Jackson*, 443 U.S. at 324, and *Wright* v. *West*, 505 U.S. 277, 296-97 (1995).

The magistrate judge determined that the California appellate court reasonably found sufficient evidence based on several factors: respondent was alone with the child at the time of his death; respondent admitted that she shook Etzel when he appeared to be unconscious; three medical experts testified that Etzel died of Shaken Baby Syndrome; and, at least once, respondent made statements that could be interpreted as admissions of guilt.

Although the magistrate judge expressed the belief that this "was not the typical shaken baby case," he concluded that

> it is not for this Court in a habeas proceeding to re-examine the medical evidence and determine which evidence the jury should have accepted and which it should have rejected. . . . The jury was presented with the medical evidence–both the evidence from the prosecution's three doctors that Etzel died from being shaken and the evidence from Petitioner's two doctors that the evidence did not establish that Etzel died from being shaken. The jury, apparently, accepted the testimony of the prosecution's experts and rejected the testimony of Petitioner's. This Court is not at liberty to

> substitute its judgment in place of the jury's based on Petitioner's argument that her version of what happened should have been accepted by the jury.

App. I at 64. The district court adopted the magistrate judge's recommendation. App. G, H.

In a published decision, a Ninth Circuit panel reversed and ordered the district court to grant the writ. The panel held that the California Court of Appeal had unreasonably applied the *Jackson* test. The panel asserted that the prosecution witnesses had not identified Etzel's death as occurring in the "usual manner" of Shaken Baby Syndrome deaths. The panel expressed the view that visible physical evidence in the form of torn brain stem tissue was necessary to a finding of Shaken Baby Syndrome and that, because no such physical evidence was found in the autopsy, "there simply was no evidence to permit an expert conclusion one way or the other" regarding cause of death. The panel disregarded the testimony of the three prosecution experts explaining why evidence of brain-stem tearing was not and could not be seen under these circumstances. Asserting that there was "no other evidence supporting death by violent shaking," the panel concluded that "no rational trier of fact" could have found that respondent was responsible for Etzel's death. App. F; *Smith* v. *Mitchell*, 437 F.3d at 888-90.

The Ninth Circuit denied the Warden's petition for panel and en banc rehearing, but five judges dissented. Their dissenting opinion, authored by Judge Bea, observed that

> the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would

> result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions.

App. E at 37; *Smith* v. *Mitchell*, 453 F.3d at 1208 (Bea, J., dissenting from denial of rehearing en banc). In a careful review of the record, the dissenters reasoned that the prosecution experts had based their finding that violent shaking killed Etzel on the presence of evidence of recent trauma *other* than brain stem tearing. Said differently, the "physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why." App. E at 34; *Smith* v. *Mitchell*, 453 F.3d at 1206. The dissent concluded that the panel's "rejection of qualified expert opinions distorts *Jackson* and contravenes AEDPA's required deference . . . ." App. E at 37; *Smith* v. *Mitchell*, 453 F.3d at 1208.

In her first petition for writ of certiorari, the Warden asserted that the Ninth Circuit had impermissibly reweighed the evidence and substituted its own resolution of the conflict between the prosecution and defense expert witnesses for that of the jury. In so doing, the petition argued, the Ninth Circuit had overlooked settled rules of constitutional sufficiency review of conflicting expert opinions. More basically, however, the Warden also contended that the Ninth Circuit had failed to accord the state court adjudication of the claim, especially the state court conclusion that this was a conflict-of-the-evidence case rather than a "no-evidence" case, the deference required by 28 U.S.C. § 2254(d)(1).

This Court granted certiorari, vacated the judgment of the Ninth Circuit, and remanded the case for reconsideration (GVR) in light of *Carey* v.

Musladin. There, this Court "held that a state court had not '"unreasonabl[y] appli[ed] clearly established Federal law"' when it declined to apply our precedent concerning state-sponsored courtroom practices to a case involving spectator conduct at trial . . . ." *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1418 (2009) (*quoting Musladin*, 549 U.S. at 76-77).

On remand, the Ninth Circuit determined that its original decision was "unaffected by *Musladin*," and reinstated that decision unchanged. The Ninth Circuit panel asserted that *Jackson*, unlike the Court's precedent applied in *Musladin*, required application of a broad, general principle. App. D at 20-22; *Smith* v. *Patrick*, 508 F.3d at 1259. Based on this asserted understanding of the meaning of the *Musladin* remand order and the operation of § 2254(d)(1), the Ninth Circuit again rejected the state appellate court determination that the issue of the cause of death in this case presented only a conflict of expert opinion. In place of that state court finding, the Ninth Circuit adhered to its original conclusion that in this case there was *no* evidence that violent shaking was the cause of death, not merely that there was a conflict of expert opinion on whether such shaking caused the death. App. D at 25; *Smith* v. *Patrick*, 508 F.3d at 1261; *see also* App. C at 13-15; *Smith* v. *Patrick*, 519 F.3d at 900-01.

Respondent again filed a petition for writ of certiorari, and this Court again granted, vacated, and remanded for further consideration, this time in light of *McDaniel* v. *Brown*, 130 S. Ct. 665. *Brown* involved a situation in which the Ninth Circuit had granted habeas relief for insufficiency of the evidence based on its evaluation that the prosecution expert trial testimony should be discounted in favor of the defense expert trial testimony. This Court held that

this was impermissible under *Jackson* and under the deferential federal habeas standard of 28 U.S.C. § 2254(d). *Brown*, 130 S. Ct. at 672-74.

On remand, the Ninth Circuit again reinstated its original opinion unchanged. App. B at 7-12; *Smith* v. *Mitchell*, 624 F.3d at 1236-40. This time, it said that, unlike in *Brown*, there was no "powerful" or "convincing" evidence of guilt and "no conflict in the evidence of the historical facts" in this case. The panel concluded that *Brown* "does not cast doubt on the correctness of our decision, of which we remain convinced."

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT FAILED TO PROPERLY APPLY *BROWN* AS REQUIRED BY THIS COURT'S SECOND REMAND ORDER

In *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008) (per curiam), after the Ninth and Seventh Circuits had reaffirmed their decisions granting habeas relief after GVRs, this Court again took up the cases and reversed for failure to hew to AEDPA's strict requirements for granting relief. By summarily reversing in *Van Patten*, and unanimously reversing in *Musladin*, this Court strongly indicated it will not tolerate a circuit court's refusal to treat a GVR order as "a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review." *Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996). Yet even after two GVRs in this case, the Ninth Circuit has persisted in its erroneous view of AEDPA and of this Court's sufficiency-of-evidence precedents.

Indeed, the latest intervening development, the *McDaniel* v. *Brown* decision, has but one clear application to this case. This Court in *Brown* held that the Ninth Circuit, under the deferential standards for constitutional sufficiency and federal habeas review, had "made an egregious error" by finding that the evidence was constitutionally insufficient to support the conviction because a defense expert's DNA testimony so undermined the prosecution's expert DNA testimony that the prosecution's expert testimony should be disregarded. *McDaniel* v. *Brown*, 130 S. Ct. at 673-74. In light of *Brown*'s instruction, the Ninth Circuit should have reconsidered and reversed its finding that the defense forensic experts' opinion in this case trumped the prosecution forensic experts' opinion that baby Etzel had died from Shaken Baby Syndrome.

A simple application of *Brown* shows that habeas relief must be denied under 28 U.S.C. § 2254(d). In *Brown*, the Nevada federal habeas petitioner was convicted of rape. At trial, the prosecution submitted evidence from a DNA expert, Renee Romero, showing that the petitioner's DNA matched the DNA recovered from semen found on the victim's underwear. *Brown*, 130 S. Ct. at 667-69. After the Nevada state courts denied appellate and post-conviction relief, the petitioner filed a federal habeas petition arguing that the Nevada Supreme Court's decision had been contrary to, and an unreasonable application of, *Jackson* v. *Virginia*. *Brown*, 130 S. Ct. at 669. The petitioner relied on a report (the Mueller Report)—prepared by a new DNA expert and never presented at trial—that concluded that the prosecution's DNA testimony was "inaccurate and unreliable" and rendered the evidence insufficient to convict him. *Id.* at 669.

The district court in *Brown* granted habeas relief on his *Jackson* claim, and the Ninth Circuit affirmed. *Brown*, 130 S. Ct. at 669-70. The Ninth Circuit found that the prosecution expert's DNA testimony was so "unreliable and misleading" that it should be excluded, and that, absent this testimony, it was objectively unreasonable for the state court to deny the sufficiency claim. *Id.* at 670.

This Court reversed. It began its analysis by noting that even the petitioner had now agreed that it was error "for the District Court to admit the Mueller Report for the purpose of evaluating his *Jackson* claim." Under *Jackson*, a court must only "'determine whether the jury acted in a rational manner in returning a guilty verdict based on the evidence before it, not whether improper evidence violated due process' . . . ." *Brown*, 130 S. Ct. at 672.

More pertinent to this case, this Court in *Brown* also held in the alternative that, even if the Mueller Report could be considered in evaluating the petitioner's *Jackson* claim, "the court made an egregious error in concluding the Nevada Supreme Court's rejection of respondent's insufficiency-of-the-evidence claim 'involved an unreasonable application of . . . clearly established Federal law.'" *Brown*, 130 S. Ct. at 672 (*citing* 28 U.S.C. § 2254(d)(1)). As this Court explained, "Mueller's claim that Romero used faulty assumptions and underestimated the probability of a DNA match between brothers indicates that two experts do not agree with one another, not that Romero's estimates were unreliable." *Id.* at 673. By selecting the defense expert's conclusion over the prosecution expert's conclusion, however, the Ninth Circuit had "departed from the deferential review that *Jackson* and

§ 2254(d)(1) demand." *Brown*, 130 S. Ct. at 673. As the Court put it:

> A federal habeas court can only set aside a state-court decision as "an unreasonable application of . . . clearly established Federal law," 28 U.S.C. § 2254(d)(1), if the state court's application of that law is "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000). And *Jackson* requires a reviewing court to review the evidence "in the light most favorable to the prosecution." 443 U.S., at 319. Expressed more fully, this means a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*, at 326; see also *Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("The *Jackson* standard . . . looks to whether there is sufficient evidence which, if credited, could support the conviction."). The Court of Appeals acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that.

Id. at 673 (internal parallel citations omitted).

This case, similarly, presented a straightforward contest of experts on the key issue of cause of death. The jury believed the prosecution experts. But, in violation of *Brown*, 130 S. Ct. at 672-73, the Ninth Circuit directly overrode the jury's decision crediting the testimony of those experts. Indeed, the panel held that it was not only erroneous but "objectively unreasonable" for the state appellate court to find

that a rational finder of fact might have *disbelieved* the opinion of the defense experts on the critical issue of cause of death. In other words, in a posture in which the federal court's review should be *doubly deferential* because both *Jackson* and AEDPA require it, the judges rejected the jury's finding and the state appellate court's adjudication as unreasonable.

The Ninth Circuit here sought to distinguish *Brown* on the ground that there was no "powerful" or "convincing" evidence of guilt and "no conflict in the evidence of the historical facts" in this case. App. B at 7-10; *Smith* v. *Mitchell*, 624 F.3d at 1237-39. But its reasoning is flawed in two main respects. First, the circuit court's requirement that there be "powerful" or "convincing" evidence to support a conviction vastly overstates the constitutional threshold of "substantial evidence" to support a conviction on sufficiency review, particularly considering the double deference to state court *Jackson* determinations under 28 U.S.C. § 2254(d). Tellingly, the court's language confirms that it impermissibly substituted its own judgment for that of the jury in this case.

Second, the Ninth Circuit incorrectly narrowed this Court's prohibition against resolving disputed facts on sufficiency review in favor of the defendant to a "conflict in the evidence of the historical facts" (App. B at 10; *Smith* v. *Mitchell*, 624 F.3d at 1239) to the exclusion of "a record of historical facts that supports conflicting inferences" (*Brown*, 130 S. Ct. at 673 (*quoting Jackson*, 443 U.S. at 326)). Critically, *Brown* requires that the conflicting reasonable *inferences* made by the prosecution experts and ultimately the jury must also be given deference. In ruling on a sufficiency claim, a reviewing court, let alone a federal habeas court, may not simply draw

whatever inferences it would like even from undisputed evidence. In any event, respondent's inconsistent statements, including about whether she told the social worker that she shook Etzel, did require the jury to resolve conflicts of historical fact, and did require the federal court to respect and take heed of these findings.

This Court's GVR under *Brown* appears to have been an implied directive for the Ninth Circuit to correct its analysis of this case. But like the circuit courts in *Van Patten* and *Mirzayance*, the Ninth Circuit misapprehended the import of the remand orders to reconsider the grant of habeas relief, and exceeded its limited authority under § 2254(d). Thus, as in *Van Patten* and *Mirzayance*, this Court's intercession is required.

II. THE NINTH CIRCUIT ERRED TWICE BY FAILING TO DEFER TO THE JURY AND THE STATE COURT DETERMINATION

The Ninth Circuit once again violated a basic rule of reviewing a jury's resolution of disputes between witnesses established long before AEDPA in *Jackson* v. *Virginia*. And it once again disrespected AEDPA's separate and additional limitations on federal review of state convictions that this Court emphasized in a sufficiency context in *McDaniel* v. *Brown*. Thus, the Ninth Circuit's "analysis illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA and to the now well-settled meaning and function of habeas corpus in the federal system." *Harrington* v. *Richter*, 131 S. Ct. 770, 787 (2011).

When a convicted defendant claims that the evidence produced at trial is constitutionally

insufficient to sustain the conviction, the familiar standard of review is whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Jackson*, 443 U.S. at 319. This Court has "emphasized repeatedly the deference owed to the trier of fact, and, correspondingly, the sharply limited nature of constitutional sufficiency review." *Wright* v. *West*, 505 U.S. at 296 (plurality opinion). "Expressed more fully, this means a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Brown*, 130 S. Ct. at 673 (*quoting Jackson*, 443 U.S. at 319).

Under AEDPA, a federal habeas court's review of a state court's adjudication must also be deferential, and the court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In other words, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. at 786-87. The existence of this second layer of protection for state court adjudications means that a federal habeas court's review of a state court's deferential adjudication of a *Jackson* sufficiency claim demands even more insulation. *Brown*, 130 S. Ct. at 674.

Even if this case had been decided on *de novo* review before the enactment of AEDPA, the Ninth Circuit's decision would have been erroneous. The Ninth Circuit violated the most basic aspect of *Jackson* review, embodied in the familiar substantial evidence test, when it reweighed the conflicting expert testimony and substituted its view that the defense experts were more persuasive than the prosecution experts for the jury's contrary view. As in *Brown*, the Ninth Circuit "acknowledged that it must review the evidence in the light most favorable to the prosecution, but the court's recitation of inconsistencies in the testimony shows it failed to do that." *Brown*, 130 S. Ct. at 673. Moreover, as in *Brown*, and as reflected in the district court's denial of relief, the state appellate court's opinion was reasonable in this case too. *Id.*

The prosecution experts testified that Etzel's death was due to the violent shaking characteristic of Shaken Baby Syndrome. Their opinion was carefully buttressed by the physical evidence they observed on autopsy, and they squarely controverted the opinions of the defense experts. When considered in combination with the additional non-expert evidence that respondent was alone with Etzel when he died, that she admitted that she shook him when he was unconscious, and that she provided inconsistent and incriminating accounts of her conduct on the night of the death, the evidence rationally supported the verdict, and it was not "objectively unreasonable" for the state court to conclude so under *Jackson's* deferential standard of review. Even if this were a close case, AEDPA still would require that the state court's resolution of the sufficiency claim be regarded as conclusive unless it is "objectively unreasonable." It was hardly "unreasonable" here.

The Ninth Circuit's decision hinges on its assertion that this was not a case of a conflict in the evidence, but rather that there was *no* evidence that the infant's death was caused by violent shaking. App. B at 12; App. F at 50-51; *Smith* v. *Mitchell*, 624 F.3d at 1237; *Smith* v. *Mitchell*, 437 F.3d at 889-90. But this is simply not true. Although the Ninth Circuit asserted that the prosecution experts did not rely on any physical evidence in the infant's brain to support their conclusion, the record in fact demonstrates that "what provided the basis for the doctors' opinions was the evidence of recent trauma to Etzel's brain: (1) the subdural hemorrhaging; (2) the subarachnoid hemorrhaging; (3) the hemorrhaging around the optic nerves; (4) the blood clot between the hemispheres of Etzel's brain; and (5) the bruise and abrasion at the lower back of Etzel's head." *Smith*, 453 F.3d at 1206 (Bea, J., dissenting from denial of rehearing en banc). The prosecution experts' opinions were also justified by their well-explained rejection of the alternative theories of death. Smith's inculpatory statements and changing stories further supported the jury's conclusion that she caused Etzel's death.

At bottom, the Ninth Circuit simply preferred the opinions of the defense experts to those of the prosecution experts. The defense expert testimony that a brain stem injury and eye hemorrhaging must always be physically detectable to support a finding of Shaken Baby Syndrome created a conflict that, under *Brown*, could only be resolved by the jury, and that, under AEDPA, should not have upset the conviction. The Ninth Circuit's opinion fails to demonstrate a deferential AEDPA review of the state appellate court's deferential *Jackson* review of the jury's resolution of a dispute between experts. On the contrary, based on a cold record, with no

opportunity to observe and compare the demeanor and persuasiveness of the testimony of the competing experts, the Ninth Circuit panel reevaluated the evidence and substituted its own judgment for that of the California jury that accepted the explanation of the prosecution experts. The panel went further and also substituted its own judgment for that of the California appellate court that accepted the jury's decision to credit the testimony of the prosecution witnesses on the issue of cause of death as substantial evidence supporting the judgment of conviction.

As urged by five appellate judges in the dissent from the denial of en banc rehearing, and as the Warden contended in the first two petitions, neither of these errors, considered separately, should stand uncorrected. Especially after this Court twice remanded the case for reconsideration and the Ninth Circuit twice reiterated its first opinion unchanged, this Court should grant the petition, consider the case on the merits, and reverse.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 8, 2011

Respectfully submitted

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APPENDIX A

FILED
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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, Petitioner - Appellant, v. GWENDOLYN MITCHELL, Warden, Respondent - Appellee.	No. 04-55831 D.C. No. CV-01-04484-ABC ORDER

Before: PREGERSON and CANBY, Circuit Judges, and REED,* District Judge.

The panel voted to deny the petition for panel rehearing. Judge Pregerson has voted to deny the petition for rehearing en banc, and Judges Canby and Reed have so recommended.

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

APPENDIX B

The petition for en banc rehearing has been circulated to the full court, and no judge has requested a vote on whether to rehear the matter en banc. Fed R. App. P. 35(b).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant,* v. GWENDOLYN MITCHELL, *Respondent-Appellee.*	No. 04-55831 D.C. No. CV-01-04484-ABC OPINION

On Remand from the Supreme Court of the United States

Filed October 29, 2010

Before: Harry Pregerson and William C. Canby, Jr., Circuit Judges, and Edward C. Reed, Jr., Senior District Judge.*

Per Curiam Opinion

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

COUNSEL

Michael J. Brennan, Manhattan Beach, California, for the petitioner-appellant.

Lawrence Daniels, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

PER CURIAM:

This case is before us on remand from the Supreme Court for the second time. We reiterate the facts and course of litigation very briefly; a fuller exposition may be found in our earlier opinions and orders that we cite here.

I

Shirley Ree Smith was convicted in California state court of assault on a child resulting in death. The state court of appeal affirmed her conviction, and the California Supreme Court denied review. Smith then filed a federal habeas petition claiming that her conviction violated due process because the evidence was constitutionally insufficient. The district court denied the petition and Smith appealed. We reversed and directed issuance of the writ. *Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006). We held that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child's death, and that the state court's affirmance of Smith's

conviction was an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Smith*, 437 F.3d at 890.

The State's petition for panel and en banc rehearing was denied, *Smith v. Mitchell*, 453 F.3d 1203 (9th Cir. 2006), and the State filed a petition for certiorari in the Supreme Court. The Supreme Court granted certiorari, vacated our decision, and remanded for further consideration in light of its intervening decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006). *Patrick v. Smith*, 127 S.Ct. 2126 (2007).

On remand, we held that *Carey v. Musladin* did not cast any doubt on our earlier conclusion that Smith's case fell squarely within *Jackson*, and that the state court's denial of her claim of constitutionally insufficient evidence was an unreasonable application of *Jackson*. 508 F.3d 1256, 1261. We also held that a later intervening Supreme Court decision in *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), did not affect our earlier result. *Id.* at 1260. We accordingly reinstated our previous opinion and judgment that a writ of habeas corpus must issue. *Id.* at 1261.

We subsequently denied the State's petition for panel and en banc rehearing, rejecting the State's contention that the Supreme Court's recent decision in *Wright v. Van Patten*, 128 S. Ct. 743 (2008), required us to reverse course.

The State once again petitioned for certiorari. The Supreme Court granted the writ, vacated our judgment, and remanded for further consideration in light of *McDaniel v. Brown*, 130 S. Ct. 665 (2010) ("*Brown*").

We have now examined *Brown* along with supplemental briefs from the parties addressing its potential effect on Smith's case. We conclude that nothing in *Brown* is inconsistent with our prior decision or our method of reaching it. We accordingly reinstate our former decision, reported at 437 F.3d 884.

II

Brown involved a decision of this court that, like our decision in *Smith*, held that a state conviction failed to pass constitutional muster under the standard of *Jackson v. Virginia*. There the similarity of the two cases ends.

Brown's conviction rested partly, but not entirely, on DNA evidence. In presenting that evidence, the prosecution's expert introduced inaccuracies by testimony "equating random match probability with source probability, and [by] an underestimate of the likelihood that one of [the defendant's] brothers would also match the DNA left at the [crime] scene." 130 S. Ct. at 671. In applying the *Jackson* standard, this court took into account an expert report ("the Mueller Report") commissioned by the defense for its collateral attack some 11 years after the trial. By the time the case reached the Supreme Court, Brown had conceded that this consideration of posttrial evidence was improper because the *Jackson* standard addresses whether any rational jury could convict on the evidence presented at trial. The Supreme Court stated that the concession was clearly correct. *Id.* at 672.

The Supreme Court went on, however, to rule that, even if the Mueller Report could have been

considered, it did not render the evidence insufficient because it did not dispute that the DNA evidence matched the defendant. "That DNA evidence remains powerful inculpatory evidence even though the State concedes [its expert] overstated its probative value. . . . Even under Mueller's odds, a rational jury could consider the DNA evidence to be powerful evidence of guilt." *Id.* at 673.

The Supreme Court also faulted this court for treating inconsistencies in factual testimony (such as the time the defendant left a bar on the night of the crime, or the reason that he washed his clothes when he later arrived home) in a manner indicating that it had failed to review the evidence in the light most favorable to the prosecution. *See id.* The Supreme Court stated that this court "further erred in finding that the Nevada Supreme Court's resolution of the *Jackson* claim was objectively unreasonable." *Id.* at 674.

III

[1] Our decision in *Smith* did not share the deficiencies that the Supreme Court pointed out in our opinion in *Brown*. First, and perhaps most important, the record in *Smith*'s case did not contain "powerful evidence of guilt," *Brown*, 130 S. Ct. at 673, that a rational jury could accept as proof of guilt beyond a reasonable doubt. Smith was convicted on the theory, presented by the prosecution experts, that she had shaken her seven-week-old grandchild to death while the child's mother slept some twenty feet away. There was no dispute in the evidence that Smith theretofore had been a caring grandmother for the three children commonly left in her care. No one saw her shake the baby with the violence that the

prosecution witnesses said must have caused the death. Indeed, the emergency personnel and emergency room physicians responding to the 911 call of Smith and her daughter considered the death to be an instance of Sudden Infant Death Syndrome, and that diagnosis changed only when the autopsy revealed some blood, both old and new, in the victim's brain. We described the evidence in our decision:

> All of the expert testimony offered by both sides agreed that the amount of recent bleeding (approximately one or two tablespoons) was not sufficient to have caused death, nor was the small abrasion sufficient for that purpose. To the prosecution experts, however, the presence of blood supported the diagnosis of Shaken Baby Syndrome. There was no dispute, however, that the usual Shaken Baby Syndrome death occurs from massive bleeding or swelling of brain tissue that creates such crushing pressure against the brain stem that vital processes are interrupted and the baby dies. It was also agreed that in 80% or more of the cases of Shaken Baby Syndrome, there is bleeding in the retinas of the eyes. There are also frequently fractures in the arms or similar evidences of violence.
>
> There was no swelling, and only a small, non-fatal amount of bleeding, in Etzel's case. Etzel had no retinal bleeding, and no fractures or large bodily bruises common in cases of shaking. The scalp abrasion was minimal, and was not even discovered until well into the autopsy.
>
> The prosecution experts testified, however, that shaking caused the death even though the

> physical examination of the brain during and after autopsy could not demonstrate that fact. The experts testified that the shaking must have been so violent and severe that it directly tore or sheared parts of the brain stem, causing immediate cessation of vital activity such as breathing. This tear in the brain stem would not have been apparent in autopsy, according to the prosecution experts, because instantaneous death would have prevented any bleeding or swelling. No microscopic examination of the brainstem was performed following the autopsy because, as Dr. Erlich testified, "[W]e wouldn't have seen anything anyway." The fatal tear or shearing would not have been detectable. Dr. Ehrlich could not identify any source in the literature for her hypothesis of undetectable brain stem shearing, but said she had learned it from lectures and consultations.

437 F.3d at 887 (footnote omitted). Thus the theory that Smith had shaken the baby so violently that the brain stem sheared in a way that caused immediate death with no bruising or bleeding could not be verified by examination of the brain. Nothing in the physical evidence supported the prosecution experts' testimony as to the cause of death. We concluded that this evidence was "simply not the stuff from which guilt beyond a reasonable doubt can be established, especially in the face of all the other circumstances, many of which were recited by the magistrate judge, making the crime unlikely." *Id.* at 890.

[2] The state of the trial record in this case, therefore, is entirely different in degree and kind from that in *Brown*. And there is no question that, in *Brown*, the Supreme Court relied heavily on the

evidence of guilt that remained for the jury even if the expert's inaccuracies were combed out. Indeed, in introducing its holding in *Brown*, the Court stated:

> We granted certiorari to consider whether [the district and appeals] courts misapplied *Jackson*. *Because the trial record includes both the DNA evidence and other convincing evidence of guilt, we conclude that they did.*

130 S. Ct. at 667 (emphasis added). We are satisfied that no comparable statement can be made about the state of the record in *Smith*.

[3] Next, it almost goes without saying that our decision was not subject to the error that was conceded by the defense in *Brown*: consideration of evidence that was not before the jury. Our decision in *Smith* that no rational jury could find Smith guilty beyond a reasonable doubt was based entirely on the evidence presented to the jury at trial. That aspect of *Brown* is inapplicable here.

[4] Finally, we conclude that our decision in *Smith* did not fail to accept the prosecution's view of any evidence of historical fact, thus failing to accord deference to the state court's application of *Jackson*. *See Brown*, 130 S. Ct. at 673. In truth, there was virtually no conflict in the evidence of the historical facts in *Smith*. The testimony regarding Smith's loving care of her grandchildren was uncontroverted. The testimony regarding events on the night of the victim's death was also not in conflict. There was not even any dispute over the condition of the victim's body immediately after death and later during the autopsy. There was no dispute over the usual indications of Shaken Baby Syndrome, such as

extensive bruising or broken limbs, detached retinas, and massive bleeding and swelling of the brainstem, all of which were absent in this case. The only dispute rose from the prosecution's expert testimony that Smith must have shaken the baby so violently that it sheared the brainstem in a way that was undetectable because death was instantaneous. In sum, there was no verifiable evidence to support the prosecution experts' testimony as to the cause of death. In concluding that no rational jury could find beyond a reasonable doubt, in light of all the evidence, that Smith had shaken the baby to death, we did not resolve any disputes of historical fact against the prosecution. We simply assessed the prosecution's evidence on its own terms and concluded that it did not meet the *Jackson* standard, and that it was so lacking that the state court's rejection of Smith's argument over the insufficiency of the evidence was an unreasonable application of *Jackson* to the facts of this case.[1] We do not find anything in *Brown* to cast doubt on these rulings.

[5] As we indicated in our original opinion, we are acutely aware of the double layer of deference required by the *Jackson* standard when it is combined with the standard of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d). *See Smith*, 437 F.3d at 888-89; *cf. Renico v. Lett*, 130 S. Ct. 1855, 1862 & n.1 (2010). We acknowledged the

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[1]We recognize that, to permit relief by habeas corpus, the state court's application of *Jackson* to the facts of this case must be " 'objectively unreasonable.' " *Brown*, 130 S. Ct. at 673 (quoting *Williams v. Taylor*, 529 U.S. 362, 409 (2000). We are satisfied by the state of the evidence that this requirement was met.

double layer of deference in holding that, even with it, the California Court of Appeal had unreasonably applied *Jackson* in finding the evidence constitutionally sufficient. *See id.* at 890. We did not lightly conclude that, "[i]n this most unusual case," *id.* at 889, the writ must be granted even after the requisite deference is accorded to the decisions of the jury and the reviewing state court. Cases of constitutional insufficiency of evidence where the writ must issue even after consideration of the double level of deference will necessarily be rare, confined to extraordinary cases. We are satisfied that this is such an extraordinary case, and that "[a]s a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice." *Smith*, 437 F.3d at 890.

IV

[6] Pursuant to the Supreme Court's mandate, we have further considered our decision in light of the Supreme Court's decision in *McDaniel v. Brown*. For the reasons set forth above, and in light of our prior opinions and orders cited in Section I of this opinion, we conclude that *Brown* does not cast doubt on the correctness of our decision, of which we remain convinced. We accordingly reinstate our earlier judgment and opinion, as reported at 437 F.3d 884.

OPINION AND JUDGMENT REINSTATED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant,* v. DEBORAH L. PATRICK, Warden, *Respondent-Appellee.*	No. 04-55831 D.C. No. CV-01-04484-ABC ORDER

Filed February 27, 2008

Before: Harry Pregerson and William C. Canby, Jr., Circuit Judges, and Edward C. Reed, Jr.,* District Judge.

ORDER

The State has filed a petition for panel and en banc rehearing of our order reinstating our decision granting habeas corpus relief to appellant Smith. *See Smith v. Patrick*, 508 F.3d 1256 (9th Cir. 2007). By supplemental letter, *see* Fed. R. App. P. 28(j), the State has called our attention to the Supreme Court's recent decision in *Wright v. Van Patten*, 128 S. Ct. 743 (2008) (per curiam). In *Van Patten*, the Seventh Circuit had held that an attorney's appearance by speaker phone at a plea hearing constituted

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

ineffective assistance of counsel that was inherently prejudicial under *United States v. Cronic*, 466 U.S. 648 (1984). *See Van Patten v. Deppisch*, 434 F.3d 1038 (7th Cir. 2006). The Supreme Court vacated the decision and remanded for reconsideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). *See Schmidt v. Van Patten*, 127 S. Ct. 1120 (2007) (mem.). On remand, the Seventh Circuit adhered to its earlier decision. *Van Patten v. Endicott*, 489 F.3d 827 (7th Cir. 2007). The Supreme Court then reversed, holding that it had never addressed the question whether counsel's "participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence." 128 S. Ct. at 746. Because the Supreme Court had not addressed that question, the state court could not have unreasonably applied clearly established federal law as determined by the Supreme Court. *Id.* at 747; *see* 28 U.S.C. § 2254(d)(1).

For the same reason that we determined that *Musladin* did not affect our decision in *Smith*, we conclude that *Van Patten* does not, either. *Van Patten* addresses an entire class of cases under the Supreme Court's jurisprudence applying the standards set by *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel. Whether appearance of counsel by telephone is structural error is an issue "for another day" that the Supreme Court may address to establish a rule for innumerable cases in the future. *See* 128 S. Ct. at 747.

Smith is quite a different matter. The standard for constitutional insufficiency of evidence is established by *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). There are infinite potential scenarios in which the evidence may be insufficient to convict; the standard

is simply whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* A decision by the Supreme Court that, under a particular set of facts, the constitutional *Jackson* standard was or was not met, provides no guide for future decisions addressing different facts. Thus the governing standard is *Jackson* itself, if *Jackson* is to be given any effect in the habeas context in which it arose. *Jackson* is law clearly established by the Supreme Court, and an unreasonable application of *Jackson* by the state appellate court in Smith's case therefore permits federal habeas relief under 28 U.S.C. § 2254(d)(1).

Accordingly, the panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Judge Pregerson has voted to deny the petition for rehearing en banc, and Judges Canby and Reed have so recommended.

The petition for en banc rehearing has been circulated to the full court along with this order, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant*, v. DEBORAH L. PATRICK,* Warden, *Respondent-Appellee*.	No. 04-55831 D.C. No. CV-01-04484-ABC OPINION

On Remand from the
United States Supreme Court

Filed December 4, 2007

Before: Harry Pregerson and William C. Canby, Jr.,
Circuit Judges, and Edward C. Reed, Jr.,**
District Judge.

Per Curiam Opinion

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*Deborah L. Patrick is substituted for her predecessor, Gwendolyn Mitchell, as Warden. Fed. R. App. P. 43(c)(2).

**The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

COUNSEL

Michael J. Brennan, Manhattan Beach, California, for the petitioner-appellant.

Kristofer Jorstad, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

PER CURIAM:

Shirley Ree Smith was convicted in California state court of assault on a child resulting in death. The state court of appeal affirmed her conviction, and the California Supreme Court denied review. Smith then filed a federal habeas petition claiming that her conviction violated due process because the evidence was constitutionally insufficient. The district court denied the petition and Smith appealed. We reversed and directed issuance of the writ. *Smith v. Mitchell*, 437 F.3d 884 (9th Cir. 2006). We held that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child's death, and that the state court's affirmance of Smith's conviction was an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307 (1979). *Smith*, 437 F.3d at 890.

The State's petition for panel and en banc rehearing was denied, 453 F.3d 1203 (9th Cir. 2006), and the State filed a petition for certiorari in the Supreme Court. While that petition was pending, the

Supreme Court decided *Carey v. Musladin*, 127 S. Ct. 649 (2006). It then granted certiorari in this case, vacated our judgment, and remanded "for further consideration in light of *Carey v. Musladin* . . . ." *Patrick v. Smith*, 127 S.Ct. 2126 (2007).

We ordered supplemental briefing by the parties, and have now reconsidered our decision as directed. We conclude that our earlier decision is unaffected by *Musladin*, and we accordingly reinstate our judgment and opinion.

I

[1] The crucial issue in *Musladin*, as here on remand, is whether a state court's affirmance of a conviction "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[1] In *Musladin*, the defendant was convicted of murder in a trial during which members of the victim's family sat in the front row of the spectators' gallery wearing buttons displaying a photograph of the victim. On federal habeas review, this court ordered the writ to issue, holding that the state court had applied a test of inherent prejudice that was contrary to or an unreasonable application of Supreme Court precedent, *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). *Musladin v. Lamarque*, 427 F.3d 653, 656-58 (2005).

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[1]Section 2254 was amended to its present form by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132 (1996).

[2] The Supreme Court vacated, holding that the precedent on which the petitioner relied had been confined to government-sponsored conduct. The Supreme Court had never addressed a claim that private-actor courtroom conduct (short of mob domination of a trial) was inherently prejudicial to a fair trial. The effect of spectator conduct therefore was "an open question" in Supreme Court jurisprudence. *Musladin*, 127 S.Ct. at 653. Accordingly, the state court decision had not been contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. *Id.* at 654.

II

[3] We find no comparable problem in this case. We held that the opinion of the prosecution experts that shaking of the infant had caused death was wholly unsupported by the physical evidence. The prosecution witnesses themselves testified that the deceased infant's brain disclosed no evidence to support their view that violent shaking had sheared the brain stem in a manner that caused instantaneous death. The physician who performed the autopsy also testified that further dissection of the brain would have disclosed no such evidence. There was no dispute that the small amount of bleeding, and the small abrasion on the scalp, could not have caused death. There was, accordingly, a failure of evidence to support the opinion of the expert witnesses that shaking had caused the death. On the whole record, we concluded that the evidence did not meet the standard of *Jackson v. Virginia*: no rational juror considering all of the evidence in the light most favorable to the prosecution could find guilt beyond a reasonable doubt. *See Jackson*, 443

U.S. at 319. The evidence was so lacking that we further concluded that affirmance of Smith's conviction was an unreasonable application of *Jackson*.

[4] Nothing in the State's failure of evidence takes this case out of the class of cases subject to the test of *Jackson*. Unlike *Musladin*, where the private-actor conduct at issue had never been the subject of Supreme Court consideration, this case presents merely one more instance where the evidence presented by a state is wholly insufficient to permit a constitutional conviction. *Jackson* makes clear that such cases cannot constitutionally stand if the evidence was insufficient "to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson*, 443 U.S. at 316. This standard is not as severe for defendants as that applied in *Thompson v. Louisville*, 362 U.S. 199 (1960), which held it to be a violation of due process to convict on *no* evidence. *Jackson* makes clear that a conviction is unconstitutional even if there is *some* evidence of guilt when all of the evidence, viewed in the light most favorable to the prosecution, does not permit any rational fact-finder to find guilt beyond a reasonable doubt. *Jackson*, 443 U.S. at 314-18. Smith's case accordingly falls squarely within *Jackson*. Moreover, the prosecution's evidence falls so far short that it was unreasonable for the state appellate court to conclude that it met the *Jackson* standard.

III

[5] It is true, of course, that the Supreme Court has never had a case where the issue was whether the evidence, expert and otherwise, was

constitutionally sufficient to establish beyond a reasonable doubt that a defendant had shaken an infant to death. But there are an infinite number of potential factual scenarios in which the evidence may be insufficient to meet constitutional standards. Each scenario theoretically could be construed artfully to constitute a class of one. If there is to be any federal habeas review of constitutional sufficiency of the evidence as required by *Jackson*, however, section 2254(d)(1) cannot be interpreted to require a Supreme Court decision to be factually identical to the case in issue before habeas can be granted on the ground of unreasonable application of Supreme Court precedent. The Supreme Court does not interpret AEDPA in such a constrained manner.

> AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced.

Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007) (internal quotation marks and citations omitted); *see also Van Patten v. Endicott*, 489 F.3d 827, 828 (7th Cir. 2007) ("Neither § 2254 nor *Musladin* limits relief to the precise factual situations addressed in the Supreme Court's previous cases.").[2] Habeas relief is

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[2]The requirement is different under one scenario of the "contrary to" prong of section 2254(d)(1). A state-court decision is "contrary to" a Supreme Court decision when the state court "confronts a set of facts that are materially indistinguishable

(continued...)

appropriate under the "unreasonable application" prong of section 2254(d)(1) when a state court violates the *principle* of clearly-established federal law that has been determined by the Supreme Court:

> A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision "involv[ing] an unreasonable application of . . . clearly established Federal law."

Williams v. Taylor, 529 U.S. 362, 407-08 (2000) (brackets in original); *see also Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1671 (2007) (holding that "ignoring the fundamental principles established by our most relevant precedents" is a factor leading to a result "contrary to" and "an unreasonable application of" Supreme Court precedent). We conclude, therefore, that Smith's case easily falls within the principle established by *Jackson*, and that the affirmance of Smith's conviction was an unreasonable application of *Jackson*.

[6] We also reject the State's contention that the Supreme Court's recent decision in *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), requires a more exact congruence between the facts of Smith's case

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(...continued)
from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). The facts need not be materially indistinguishable, however, for a grant of habeas relief under the "unreasonable application" prong of section 2254(d)(1). *See id.* at 407-08.

and those of *Jackson*. In *Landrigan*, the Supreme Court held that none of its precedents precluded a state court from denying a claim of ineffective assistance of counsel asserted by a defendant who told the court that he had instructed his attorney not to present mitigation evidence. *Id.* at 1942. The Supreme Court rejected this court's ruling that the state court had unreasonably applied *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Strickland v. Washington*, 466 U.S. 668 (1984), stating that "[n]either *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." *Landrigan*, 127 S. Ct. at 1942.

[7] Here again, we fail to see a parallel between *Landrigan* and Smith's case. There was a structural difference between the ineffective assistance cases on which Landrigan relied and his case, in which he had prevented counsel from presenting mitigation evidence in court. The existing Supreme Court standards of ineffective assistance required tailoring or modification to apply to this new situation. No such adaptation of the *Jackson* standard is required in order to apply it to Smith's case, one of many that simply involves a failure of proof. For the same reasons that we find Smith's case to be unaffected by *Musladin*, we conclude that it also is unaffected by *Landrigan*.

IV

Musladin also pointed out that, to be "determined by the Supreme Court" within the meaning of section 2254(d), the federal law in issue must be established by the holding, as opposed to dicta, of the Supreme Court's decision. *Musladin*, 127 S. Ct. at 653. "The

Court's 'holding,' " however, necessarily refers not only to the result reached, but also the rationale necessary to the reaching of that result. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996).

[8] Although in *Jackson* the Supreme Court ultimately denied relief because the evidence had been sufficient, it reached that result only after settling on the constitutional standard to govern the decision of that question. That standard was that the evidence was sufficient if "*any* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. That standard, adopted after much discussion, *see id.* at 313-319, was the sole means by which the result was reached. It was not dictum, and to our knowledge has never been treated as dictum. Indeed, the State does not claim it to be dictum in its briefing. Similarly, in *Musladin*, the Supreme Court did not treat the rules of *Williams* and *Flynn* as dicta, even though in both those cases habeas relief had been denied. We have no difficulty, therefore, in concluding that the constitutional standard announced in *Jackson* qualifies as holding, and not dictum, for purposes of section 2254(d)(1).

V

[9] We conclude, therefore, that our earlier opinion and decision, which held the state court's affirmance of Smith's conviction to be an unreasonable application of *Jackson*, is unaffected by *Musladin*. We therefore reinstate our earlier judgment and opinion, as reported at 437 F.3d 884.

OPINION AND JUDGMENT REINSTATED.

APPENDIX E

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant,* v. GWENDOLYN MITCHELL, Warden, *Respondent-Appellee.*	No. 04-55831 D.C. No. CV-01-04484-ABC ORDER

Filed July 14, 2006

Before: Harry Pregerson and William C. Canby, Jr., Circuit Judges, and Edward C. Reed,* District Judge.

Order;
Dissent by Judge Bea

ORDER

The panel voted to deny the petition for panel rehearing. Judge Pregerson has voted to deny the petition for rehearing en banc, and Judges Canby and Reed have so recommended.

The petition for en banc rehearing has been circulated to the full court. A judge requested a vote

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

BEA, Circuit Judge, with whom KLEINFELD, GRABER, TALLMAN, and CALLAHAN, Circuit Judges, join, dissenting from denial of rehearing en banc:

I write to make clear our court has, by its decision in this case, made a substantial departure from settled principles of review of jury determinations of fact in criminal cases.

In this case, our court decides the opinions of three Board-certified physicians called by the prosecution that Smith's shaking of baby Etzel caused his death must be substituted with the contrary opinions of non-Board-certified physicians called by the defense. Why? Because the defense's doctors testified that a finding was absent on autopsy, and that finding was crucial and undermined the prosecution experts' testimony. The three physicians called by the prosecution disagreed with the defense doctors, and explained why such a finding was not crucial. Our court simply accepts the defense theory and rejects the prosecution's evidence. The jury was perfectly able to do just that. But when our court does it, it steps over the line dividing the province of the jury from that of the court.

This decision would be bad enough were we reviewing a district court's judgment. But here, it is

doubly bad for we are reviewing a state court decision under the Antiterrorism and Effective Death Penalty Act ("AEDPA")[1] which severely restricts the scope of our review, and mandates that "we apply the standards of *Jackson* with an additional layer of deference." *Juan H. v. Allen*, 408 F.3d 1262, 1274 (9th Cir. 2005), *cert. den.*, 126 S. Ct. 1142 (2006).

I

In 1997, Shirley Ree Smith was convicted by a California jury of the unlawful killing of her seven-week-old grandson, Etzel Glass ("Etzel"). On the night of Etzel's death, Smith was staying with her daughter Tomeka, the infant's mother, along with her two other young grandchildren and two of Tomeka's sister's children. Around midnight, Tomeka fed, changed, and washed baby Etzel before placing him to sleep on the living room sofa. Baby Etzel shared this sofa with his 18-month-old brother, Yondale, and four-year-old sister, Yolanda. Smith was also in the living room, sleeping on the floor. When Tomeka put Etzel to sleep at 11:30 p.m., he appeared healthy.

In her two interviews, Smith recounted different versions of the events that followed. First, Smith told a social worker, Linda Reusser, that she awoke after 3 a.m. when Etzel's brother Yondale had a nightmare. After comforting Yondale, Smith went over to check Etzel. Etzel didn't respond to her touch; she picked Etzel up and his head "flopped back." She then gave Etzel "a little shake, a jostle to awaken

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[1]Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2241 *et seq.*

him," to which Etzel did not respond. Reusser described the shaking to the jury as "a quick jostle," a "smooth motion."

At this point, Smith stopped speaking. When Reusser prompted Smith to continue, she said "something like 'Oh, my God. Did I do it? Did I do it? Oh, my God.' " Smith's daughter Tomeka turned to Smith and said: "If it wasn't for you, this wouldn't have happened." Smith didn't say anything.

Smith told a slightly different story to the police who interviewed her as part of the criminal investigation. Smith stated that Yondale awoke from his nightmare sometime before 3 a.m.; Smith rose and checked Etzel; Etzel was fine. Then, past 3 a.m., Etzel's sister Yolanda rolled off the couch and fell onto Smith. On waking, Smith noticed that Etzel's diaper needed changing. After going to the bathroom to take her medicine, Smith picked up Etzel and saw he had "spit up" around his mouth, and his head was "flopped back." Smith said something to Etzel and he didn't respond; he was not breathing or moving. At first, Smith told the police she "shook" Etzel, but then corrected herself, and said she "twisted" him back and forth to get a response. When asked about her statement to Reusser, Smith denied saying that she had "shaken" Etzel.

Smith then carried Etzel, who was not responsive, into Tomeka's room. Smith and Tomeka called 9-1-1. After unsuccessful attempts at cardio-pulmonary resuscitation ("CPR") by the family and the paramedics, Etzel was taken to the hospital. Soon after his arrival, he was declared dead. The physician attending at the hospital suspected Etzel had died of Sudden Infant Death Syndrome ("S.I.D.S."), which,

as one defense expert put it, is "a medical[ly] sophisticated way of saying the child died and we really don't have any idea what it died from." The only injury the paramedics noticed was fresh blood in one of Etzel's nostrils. In such cases, the doctor lists "suspected S.I.D.S." as the cause of death, pending an autopsy.

But here, the autopsy revealed signs of recent trauma to Etzel's brain. When the autopsy surgeon lifted Etzel's brain out of the skull, she saw fresh blood on top of the brain ("subdural"[2] blood). The subdural blood measured one or two tablespoons. The surgeon also saw a fresh blood clot between the hemispheres of Etzel's brain, and recent hemorrhaging around the optic nerves. Further, she found a small quantity of fresh "subarachnoid" blood. Finally, the surgeon and her supervisor noticed a small bruise at the left lower-back part of Etzel's head, and a recent abrasion at the same site.

Dr. Carpenter, the autopsy supervisor, opined Etzel had died by being violently shaken ("shaken baby syndrome").[3] According to Carpenter, death

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[2]As an expert testified below, the brain is protected by three sheaths or membranes: the dura, the arachnoid, and the pia. Blood found between the dura and the arachnoid is referred to as "subdural." Blood between the arachnoid and the pia is referred to as ""subarachnoid."

[3]Dr. Carpenter was Board-certified in forensic, anatomic, and clinical pathology. Tr. 534-36. "Board-certified" means the physician has first practiced a certain number of years in the field of specialty which the Board regulates. To gain certification as a specialist by the Board, the physician must then take certain written tests. Last, upon successful

(continued...)

from violent shaking can occur in three ways: (1) massive swelling of the brain; (2) massive bleeding sufficient to crush the brain stem; or (3) a sudden shaking "so violent that it destroys the vital centers in the brain and is a quick death." Here, Carpenter opined that death occurred through the last process, as Etzel's head had undergone whiplash from chin to chest. The death occurred too quickly for visible trauma to develop on the brain stem itself.

Dr. Carpenter explained the basis of his opinion as the recent trauma to Etzel's brain and the absence of other causes. The subdural blood, the subarachnoid blood, and the blood around the optic nerves showed "violent trauma to the head sufficient to cause the death of the infant." The bruise and abrasion had, in Carpenter's opinion, "very probably" occurred during the shaking episode, as the head collided with a hard, rough surface.[4]

The alternate causes of death that Carpenter considered didn't make sense to him. First, Carpenter ruled out S.I.D.S. because "[a case] is never called a S.I.D.S. if there is any suspicion of trauma to the infant." Second, Carpenter ruled out that a fall from the sofa onto a carpeted floor could have caused Etzel's injuries or death. Third,

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(...continued)
completion of those tests, the physician must sit successfully for oral examination by a group of Board-certified specialists. Only then can the physician become "Board-certified."

[4]While Dr. Carpenter could not rule out that Etzel's head received a blow from a weapon, the bruise and abrasion were too small to indicate a blow that could have caused all of the trauma in Etzel's brain.

Carpenter considered the evidence of an old injury to Etzel's brain, such as birth trauma, as the cause of death. While he could not exclude the old injury as contributing to Etzel's death, the old injury was "not sufficient to cause death in that the infant had apparently sufficiently recovered from this injury and was appearing to look normal to others."

Under *Jackson*, Dr. Carpenter's opinion alone suffices to support the jury's finding on causation. But then the prosecution called two other Board-certified doctors, who testified that violent shaking was the cause of death. Notably, the prosecution's witness on rebuttal, Dr. Chadwick, had published articles on how to distinguish between falls and abusive injuries in children. Based in part on his own research, Chadwick opined that a fall from the sofa was "extremely unlikely" to cause death. Chadwick also explained that the old trauma was not the cause of death because old injuries do not cause sudden death without a specific pathology that was absent in this case. In short, Chadwick saw "no other natural or unnatural cause except the injury that would explain [Etzel's] death," and, therefore, opined that Etzel died from shaken baby syndrome.

The defense's two expert witnesses, by contrast, opined that the necessary physical evidence of shaken baby syndrome was lacking. Dr. William Goldie opined the cause of death was S.I.D.S. Dr. Richard Siegler opined that the death was traumatic, but that it was impossible to isolate the cause of death between the recent and the old trauma. Significantly, both Goldie and Siegler would only diagnose Etzel's death as shaken baby syndrome on a finding of visible injury to the shorn region of the brain stem. Even if death were instantaneous, Goldie

opined that hemorrhages in the neck or brain stem would be present. Thus, the experts for the prosecution and the defense disagreed on a fundamental point: to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?

The jury resolved this conflict among the experts' opinions against Smith. The California Court of Appeal, after reviewing the medical evidence, affirmed the conviction because "[i]t was for the jury to resolve the conflicts" in that evidence. The California Supreme Court denied review. On federal habeas review, the Magistrate Judge recommended denying Smith's petition for the same reason as the California Court of Appeal. Notwithstanding the tragedy of Smith's case, it was the jury's province to choose between the conflicting expert opinions. The district court accepted the recommendation and denied Smith's habeas petition.

II

Our court, however, granted habeas relief on the ground of insufficient evidence of causation. *See Smith v. Mitchell,* 437 F.3d 884 (9th Cir. 2006). Claims of insufficient evidence are judged according to a familiar standard: we ask whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319. AEDPA requires the federal courts to review *Jackson* claims with additional deference, and only grant habeas relief where the state court's adjudication of a *Jackson* claim is objectively unreasonable. *See Smith,*

437 F.3d at 889 (citing *Juan H.*, 408 F.3d at 1274-75 & nn. 12-13).

To grant habeas relief, the opinion set aside the qualified opinions of the prosecution's experts by misconstruing the basis for their opinions. "[T]heir testimony was that death was caused by the shearing or tearing of the brain stem and"—according to the opinion—"they reached this conclusion because *there was no evidence in the brain itself of the cause of death.*" *Smith*, 437 F.3d at 890.

Not so; the opinion is inaccurate.

The physicians called by the prosecution reached their conclusion *despite* the lack of visible shearing, not because of it, and explained why. Indeed, what provided the basis for the doctors' opinions was the evidence of recent trauma to Etzel's brain: (1) the subdural hemorrhaging; (2) the subarachnoid hemorrhaging; (3) the hemorrhaging around the optic nerves; (4) the blood clot between the hemispheres of Etzel's brain; and (5) the bruise and abrasion at the lower back of Etzel's head. The prosecution's experts considered and rejected other causes of Etzel's death, such as a fall from the sofa, or the aggravation of Etzel's older injury. Since none of these alternate theories explained Etzel's death, the prosecution's doctors opined that Etzel died from violent shaking, as evidenced by the trauma.

Not once did the prosecution's doctors voice the supposed basis the opinion attributes to them. Rather their opinions were based on the evidence of the child's injuries, notwithstanding that they did not see the brain stem shearing on autopsy.

In effect, the opinion adopts the defense experts' view of what physical evidence is necessary to support a valid diagnosis of shaken baby syndrome. Specifically, the opinion relies on Dr. Siegler's aspersion of the prosecution's theory as "total fantasy," when there is "no way to confirm it or deny it" with direct physical evidence. The opinion similarly concludes "there simply was no evidence to permit an expert conclusion one way or the other," absent the physical evidence Siegler demanded. *See Smith*, 437 F.3d at 890.

But the prosecution's experts explained why they would not expect to see physical evidence of tearing in Etzel's brain stem: Etzel's death happened so quickly that the effects of the trauma did not have time to develop. That is, there was no swelling in the torn brain stem tissue because the child's instant death closed down its circulation.

The opinion buttresses its conclusion by pointing to the absence of various factors that are "typically," "usually," or "frequently" present in cases of shaken baby death. *See Smith*, 437 F.3d at 887. For instance, the opinion points to the absence of retinal bleeding, which is present in 80-85% of shaken baby cases, and almost never present otherwise. Yet Dr. Carpenter testified that the absence of retinal bleeding did not change his opinion on the cause of death. Even the defense doctor, Dr. Siegler, did not think retinal hemorrhages were necessary to diagnose shaken baby syndrome. Thus, the absence of these "usual" symptoms simply constitutes circumstantial evidence favorable to the defense, not a failure of proof as to an essential element of the prosecution's case.

Although Smith did not challenge the admissibility of the prosecution's experts' testimony, the opinion's analysis effectively makes the qualification of experts an issue on appeal.[5] Up to now, the ceaselessly litigated question of whether expert testimony is "junk science" has been

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[5]The overlap between the sufficiency of the evidence and qualification of experts is illustrated by the opinion's reliance on *United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991). There, the Second Circuit reversed a conviction for possession of cocaine with the intent to distribute. The defendant was found carrying 5.31 grams of cocaine; $1,460 in ten and twenty dollar bills; and many slips of paper bearing names, addresses, and telephone numbers. *Id.* at 231. The question was whether this evidence permitted the inference of intent to distribute the 5.31 grams. Over defense objection, the government called an expert who opined that the evidence was consistent with "classic street level distribution of small quantities of cocaine." *Id.* at 232. On appeal, the defendant challenged both the admission of this testimony and the sufficiency of the evidence. *Id.* at 231. The Second Circuit reversed for insufficient evidence. Without deciding the evidentiary issue, the court held that conclusory opinions that "ambiguous conduct constitutes criminal activity" do not count toward establishing the sufficiency of the evidence. *Id.* at 234.

Boissoneault is directly contrary to California Evidence Code § 805, which allows opinion testimony as to ultimate facts. Moreover, the subject of the opinion in *Boissoneault* was whether ambiguous conduct is criminal, an area where expert opinion is of little help to the trier of fact. *See United States v. Young*, 745 F.2d 733, 765-66 (2d Cir. 1984) (Newman, J., concurring). By contrast, whether autopsy results establish the cause of death is a question on which expert opinion is indispensable to the jury.

channeled through the *Daubert*[6] and *Kelly/Frye*[7] tests governing the qualification and admissibility of expert testimony. Under our court's approach, a federal court of appeals may, effectively, set aside an expert opinion where it conflicts with the views of the other side's experts.

Here, the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions. Accordingly, the California Court of Appeal correctly applied *Jackson* in affirming Smith's conviction.

Because our court's rejection of qualified expert opinions distorts *Jackson* analysis and contravenes AEDPA's required deference, I respectfully dissent from the denial of rehearing en banc.

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[6]*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

[7]*People v. Kelly*, 549 P.2d 1240, 1244 (1976) (citing *Frye v. United States*, 239 F. 1013, 1014 (D.C. Cir. 1923)).

APPENDIX F

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHIRLEY REE SMITH, *Petitioner-Appellant*, v. GWENDOLYN MITCHELL, Warden, *Respondent-Appellee*.	No. 04-55831 D.C. No. CV-01-04484-ABC OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
February 8, 2005—Pasadena, California

Filed February 9, 2006

Before: Harry Pregerson and William C. Canby, Jr.,
Circuit Judges, and Edward C. Reed, Jr.,*
District Judge.

Opinion by Judge Canby

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*The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

COUNSEL

Michael J. Brennan, Manhattan Beach, California, for the petitioner-appellant.

Richard T. Breen, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

OPINION

CANBY, Circuit Judge:

Shirley Ree Smith appeals the district court's denial of her habeas corpus petition. The State of California convicted Smith of assault on a child resulting in death. The state courts affirmed her conviction. Smith then filed this federal habeas petition claiming that her conviction violated due process because the evidence was constitutionally insufficient. On appeal, Smith focuses her argument almost exclusively on the absence of constitutionally sufficient evidence of one element of the crime—the cause of the child's death. We agree with Smith that no rational trier of fact could have found beyond a reasonable doubt that Smith caused the child's death. We further conclude that the state court's affirmance of Smith's conviction constituted an unreasonable application of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), which established the standard for constitutional sufficiency of the evidence. *See* 28 U.S.C. § 2254(d)(1). We accordingly reverse and remand with instructions to grant the writ.

I

Smith is the grandmother of the deceased infant, Etzel. Smith's daughter Tomeka Smith is the mother of the child. Tomeka also had two older children, Yondale and Yolanda. Prior to Etzel's birth, the entire family lived in Illinois. In July 1996, Smith moved to California and brought her two grandchildren, Yondale and Yolanda, with her. On October 8, 1996, Tomeka moved to California, where she joined Smith, Yondale, and Yolanda. Two days later, Tomeka gave birth to Etzel.

Tomeka delivered him two weeks early, and he weighed five pounds, four ounces. He was born with jaundice and a slight heart murmur. The murmur disappeared, however, three days after it was diagnosed. The jaundice gradually disappeared, too. Etzel became a healthy baby and showed no signs of child abuse.

Smith, Tomeka, Yondale, Yolanda and Etzel usually stayed with Stephen Keys, Smith's brother. Occasionally, however, they stayed with Renee Townsend, Smith's sister, at Townsend's apartment. Townsend's two children, Marcus and Marcellus lived there as well. When Tomeka and her children stayed at Townsend's apartment, Smith would accompany them to assist Tomeka in taking care of the children. Smith was described as always giving loving care to her grandchildren, and no one had ever seen her act harshly or abusively toward them.

On the night of Etzel's death, the group stayed at Townsend's. Tomeka testified at length about the events of that evening, from her own observations and from what Smith told her as the emergency

unfolded and thereafter.[1] The facts as Tomeka related them were not complicated. Etzel, who was approximately seven weeks old at the time, appeared perfectly healthy during the day and at the beginning of the evening. Both Tomeka and Smith fed him.

That night, Tomeka fed, changed, and washed Etzel before rocking him to sleep and laying him on the couch in the living room, placing him on his stomach, with his face to the side. Yondale also slept on the couch. Yolanda slept on the love seat.[2] Marcus and Marcellus slept in their bedroom.[3] Smith slept on the floor, next to the love seat on which Yolanda slept.

Townsend left the apartment at roughly the same time that Tomeka placed Etzel on the couch. Tomeka remained in the living room for another hour or so. During this time, she checked Etzel's diaper while he slept, and she saw that he moved his body at that time. She also moved Etzel back on the couch pillow because his feet started to fall off of it. She then went into Townsend's room to listen to music.

Though Tomeka usually slept in the living room with Smith and the children, that night she fell asleep in Townsend's room while listening to music. She left the door to Townsend's room open, at least

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[1]Smith herself testified very briefly, denying that she had shaken Etzel on the night of his death. She was subjected to almost no cross-examination, and her entire testimony extends for less than three pages of transcript.

[2]Yondale was approximately fourteen-months old, and Yolanda was approximately four-years old.

[3]They were seven-and ten-years old, respectively.

partially. Tomeka testified that she fell asleep around midnight. She also stated that it was the first night that she slept in a different room from Etzel. At approximately 1:30 a.m., Smith awoke and found Etzel on the floor. She picked him up, rocked him back to sleep, and placed him on the couch in the same position (stomach down, head to the side). She did not notice anything unusual about him.

At 3:20 a.m., Smith awoke again because she had to go to the bathroom. After she returned from the bathroom, she looked at Etzel and saw that he had thrown up and had blood on his right nostril. He did not respond to her touch. She picked him up and his head "flopped back." She moved him back and forth, but he did not respond.[4] She then went into Townsend's room carrying Etzel. She woke Tomeka and told her what had happened. Tomeka dialed 911. Over the phone, Tomeka and Smith were instructed to give Etzel CPR, which they did.

When firefighters and paramedics arrived, Smith was "apprehensive" and stated that she thought Etzel had fallen off the couch. Etzel was clothed and warm, but he was not breathing and had no heartbeat. The paramedics began CPR. Three of the rescue squad noticed blood in one of Etzel's nostrils, and one consequently thought Etzel had suffered an

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[4]Smith demonstrated this "jostle" to a social worker, who testified at trial. The social worker stated that Smith demonstrated picking up the baby under his arms and moving him quickly forward and back in a smooth motion. Smith later told police that she had given him a little shake, but then she corrected herself, saying she had "twisted" him slowly from side to side.

injury. When an ambulance arrived, two more technicians administered CPR on the way to the hospital. Etzel appeared "chalky." They arrived at the hospital at 3:50 a.m. Etzel was in full cardiac arrest. The attending physician pronounced him dead and suspected he died of Sudden Infant Death Syndrome ("SIDS"), a death with no known cause.

It was the theory of the prosecution, however, that this recitation of facts left out one crucial occurrence: Smith must have shaken Etzel so violently that it caused his death. The evidence offered in support of this theory was the autopsy and the controverted expert testimony, based on that autopsy, that Etzel died of Shaken Baby Syndrome.[5] The physical evidence, however, was not typical of that usually associated with Shaken Baby Syndrome.

Associate Deputy Medical Examiner Dr. Stephanie Erlich performed the autopsy on Etzel.[6] She testified, as did her supervisor, Dr. Eugene Carpenter, who participated in parts of the autopsy.[7] They found recent subdural and subarachnoid hemorrhages (i.e., bleeding on the brain). There was also evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. There was in addition a

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[5]Shaken Baby Syndrome is also known as Shaken Infant Syndrome or SIS. We use the Shaken Baby terminology to avoid confusion with Sudden Infant Death Syndrome or SIDS.

[6]This was Dr. Erlich's first autopsy in a child abuse case. She was assigned the autopsy because Etzel was originally believed to be the victim of Sudden Infant Death Syndrome.

[7]Dr. Carpenter was a Medical Examiner and forensic pathologist for the Los Angeles County Coroner. He had performed 3,000 to 4,000 autopsies.

recent small abrasion, approximately 1/16 by 3/16 of an inch, on the lower skull, upper neck region, and a recent bruise beneath this abrasion. Etzel's heart was normal.

All of the expert testimony offered by both sides agreed that the amount of recent bleeding (approximately one or two tablespoons) was not sufficient to have caused death, nor was the small abrasion sufficient for that purpose. To the prosecution experts, however, the presence of blood supported the diagnosis of Shaken Baby Syndrome.[8] There was no dispute, however, that the usual Shaken Baby Syndrome death occurs from massive bleeding or swelling of brain tissue that creates such crushing pressure against the brain stem that vital processes are interrupted and the baby dies. It was also agreed that in 80% or more of the cases of Shaken Baby Syndrome, there is bleeding in the retinas of the eyes. There are also frequently fractures in the arms or similar evidences of violence.

There was no swelling, and only a small, nonfatal amount of bleeding, in Etzel's case. Etzel had no retinal bleeding, and no fractures or large bodily bruises common in cases of shaking. The scalp abrasion was minimal, and was not even discovered until well into the autopsy.

The prosecution experts testified, however, that shaking caused the death even though the physical

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[8]In addition to Drs. Ehrlich and Carpenter, Dr. David Chadwick, a pediatrician specializing in abuse, also testified for the prosecution. His testimony was briefer than, but generally paralleled, that of Drs. Ehrlich and Carpenter.

examination of the brain during and after autopsy could not demonstrate that fact. The experts testified that the shaking must have been so violent and severe that it directly tore or sheared parts of the brain stem, causing immediate cessation of vital activity such as breathing. This tear in the brain stem would not have been apparent in autopsy, according to the prosecution experts, because instantaneous death would have prevented any bleeding or swelling. No microscopic examination of the brainstem was performed following the autopsy because, as Dr. Erlich testified, "[W]e wouldn't have seen anything anyway." The fatal tear or shearing would not have been detectable. Dr. Ehrlich could not identify any source in the literature for her hypothesis of undetectable brain stem shearing, but said she had learned it from lectures and consultations.

With regard to this undetectable cause of death, defense expert Dr. Richard Siegler, said that the hypothesis was "fantasy." When pressed by the prosecutor to elaborate, he said: "[W]hat you have said is possible, but it is also not possible and that's what we call fantasy. . . . There is no way to confirm it or deny it." Dr. Siegler stated that he had not previously heard or read of the hypothesis of undetectable brain stem injury in a Shaken Baby death.[9] Dr. Seigler opined that Etzel died from the lingering effects of earlier brain trauma of unknown

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[9]Dr. Siegler was a pathologist of many years experience associated with the University of Southern California, and formerly with Harvard and U.C.L.A. He had done 5,000 to 8,000 autopsies, about 50 of which were infants.

but quite possibly innocent cause, and that his death was inconsistent with Shaken Baby Syndrome.

The defense also presented Dr. William Goldie, who examined the records and testified that Etzel likely died of SIDS. Dr. Goldie, like Dr. Siegler, did not believe that Shaken Baby Syndrome could occur without massive brain swelling or bleeding, at least not when the brain stem appeared undamaged, as Etzel's did. He noted that prematurely born infants sometimes bleed into the head without cause. Dr. Goldie testified that SIDS was the leading cause of deaths in infants from one to five months of age, while Shaken Baby Syndrome deaths occur predominantly in ages four to nine months.

Dr. Goldie described some of the characteristics that led him to conclude that Etzel died of Sudden Infant Death Syndrome. With SIDS, the infant usually would appear normal, but then he or she suddenly would die. SIDS occurred more frequently in babies who, like Etzel, were small for their age, who had mothers who had multiple children already or smoked or used drugs, and, most importantly, who had been placed face-down on their stomachs. Males were more likely victims than females. He also concluded that Etzel's problems—jaundice, heart murmur, and low birth weight—made him more likely to die from SIDS, as did a background of poverty.

II

On this evidence, a jury of the Superior Court of Los Angeles County convicted Smith of assault on a child causing death, in violation of section 273ab of

the California Penal Code.[10] The trial judge sentenced her to fifteen years to life in prison. Smith appealed, challenging the sufficiency of the evidence. The California Court of Appeal affirmed in an unpublished opinion, and the Supreme Court of California denied review.

Smith filed a petition for habeas corpus in the Central District of California. A magistrate judge recommended dismissal, and the district court dismissed the petition. The court, however, granted a certificate of appealability on the question "[w]hether there was sufficient evidence to convict [Smith] of committing assault on a child in her care or custody causing death."

III

We review de novo the district court's denial of a habeas petition. *See Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003). We approach this case with a firm awareness of the very strict limits that the Antiterrorism and Effective Death Penalty Act ("AEDPA") places on our collateral review of state criminal convictions. *See Juan H. v. Allen*, 408 F.3d 1262, 1269-70 (9th Cir. 2005), *cert. denied*, 2006 WL 88993, 88994 (U.S. Jan. 17, 2006). We cannot grant

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[10]Section 273ab provides the following:

> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for [fifteen] years to life.

CAL. PENAL CODE § 273ab.

relief unless the decision of the California Court of Appeal was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The constitutional standard for sufficiency of the evidence established by the Supreme Court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. at 319. Our task under AEDPA, then, is to determine whether the decision of the California Court of Appeal, holding that the evidence was sufficient to convict Smith, was an unreasonable application of *Jackson*. *See* 28 U.S.C. § 2254(d); *see also Juan H. v. Allen*, 408 F.3d at 1274-75 & nn. 12-13 (establishing that AEDPA requires a layer of deference to a state court decision in addition to that specified by *Jackson)*. In this most unusual case, we conclude that the Court of Appeal unreasonably applied *Jackson*.

IV

[1] The troubling state of the evidence in this case was perhaps best described by Magistrate Judge Patrick J. Walsh. Even though, contrary to our view, he believed the strict requirements of AEDPA for habeas relief had not been met, Judge Walsh stated:

> This is not the typical shaken baby case. Grandmothers, especially those not serving as the primary care-takers, are not the typical perpetrators. Further, Petitioner was helping

> her daughter raise her other children (a 2-year-old and a 14-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel was doing anything other than sleeping the night that he died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case.

Nothing significant in the background suggests guilt, therefore, and many factors suggest innocence.[11] Indeed, not only was there no evidence of any "precipitating event that might have caused [Smith] to snap," but it is extremely unlikely that even a very troublesome act by seven-week-old Etzel would cause Smith to shake Etzel to death when his mother lay but a few feet away and easily available. A constitutionally permissible finding of guilt in this case therefore depends on the expert evidence of the cause of death.

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[11]A social worker, who visited Smith and Tomeka and expressed the view that Etzel had died of shaking, testified that Smith said "Oh, my God. Did I do it?" A rational trier of fact, however, could not convict on this distraught and equivocal statement in the absence of credible expert testimony as to the cause of death.

[2] There is no question that the prosecution experts testified that a shaking had caused the death, but they conceded the absence of the usual indicators of violent shaking such as bruises on the body, fractured arms or ribs, or retinal bleeding. There was bleeding on the brain, both old and new, but not enough to cause death. All of the prosecution witnesses based their opinion of Shaken Baby Syndrome on their hypothesis that violent shaking had torn or sheared the brain stem in an undetectable way. Their testimony was not that the brain demonstrated death in the usual manner of Shaken Baby Syndrome, caused by excessive bleeding or swelling that crushes the brain stem. Instead, their testimony was that death was caused by shearing or tearing of the brain stem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death*. Thus, as the defense expert Dr. Siegler stated, the tearing might have occurred or it might not have occurred; there simply was no evidence to permit an expert conclusion one way or the other on the point. This is simply not the stuff from which guilt beyond a reasonable doubt can be established, especially in the face of all the other circumstances, many of which were recited by the magistrate judge, making the crime unlikely. An expert's testimony as to a theoretical conclusion or inference does not rescue a case that suffers from an underlying insufficiency of evidence to convict beyond a reasonable doubt. *See United States v. Boissoneault*, 926 F.2d 230, 234 (2d Cir. 1991).

V

[3] The prosecution's expert testimony, absolutely critical to its case, concluded that the cause of death

was tearing or shearing of the brain stem when there was no physical evidence of such tearing or shearing, and no other evidence supporting death by violent shaking. Absence of evidence cannot constitute proof beyond a reasonable doubt.

[4] The California Court of Appeal, in affirming Smith's conviction, described the expert testimony but did not address the problem presented by the lack of evidence, from the autopsy or ensuing tests, that the brain stem had been sheared. It affirmed with a statement that the experts conflicted and resolution of the conflict was for the jury. With all due respect to the California Court of Appeal, and even with the additional layer of deference mandated by AEDPA, we conclude that the Court of Appeal unreasonably applied *Jackson* when it held the evidence to be sufficient to convict Smith of causing Etzel's death. There was simply no demonstrable support for shaking as the cause of death. As a result of the unreasonable application of *Jackson*, there has very likely been a miscarriage of justice in this case.

We reverse the judgment of the district court and remand with instructions to grant the writ.

REVERSED; REMANDED with instructions.

APPENDIX G

FILED
CLERK, U.S. DISTRICT COURT
APRIL 13, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
APRIL 14, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	) Case No.
	) CV 01-4484-ABC (PJW)
Petitioner,	)
	) JUDGMENT
v.	)
	)
GWENDOLYN MITCHELL, WARDEN,	)
	)
Respondent.	)

Pursuant to the Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: April 12, 2004.

/S/
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

APPENDIX H

FILED
CLERK, U.S. DISTRICT COURT
APRIL 13, 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	)	CASE NO.
	)	CV 01-4484-ABC (PJW)
Petitioner,	)	
	)	ORDER ACCEPTING
v.	)	REPORT AND
	)	ADOPTING FINDINGS,
GWENDOLYN	)	CONCLUSIONS,
MITCHELL, WARDEN,	)	AND
	)	RECOMMENDATIONS
Respondent.	)	OF UNITED STATES
	)	MAGISTRATE JUDGE
	)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the records on file, and the Report and Recommendation of United States Magistrate Judge and has considered *de novo* the portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

DATED: April 12, 2004.

/S/
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

APPENDIX I

FILED
CLERK, U.S. DISTRICT COURT
MAR 22 2004
CENTRAL DISTRICT OF CALIFORNIA
BY /s/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SHIRLEY REE SMITH,	)	CASE NO.
	)	CV 01-4484-ABC (PJW)
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION
	)	OF UNITED STATES
GWENDOLYN	)	MAGISTRATE JUDGE
MITCHELL, WARDEN,	)	
	)	
Respondent.	)	
	)	

This Report and Recommendation is submitted to the Honorable Audrey B. Collins, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Court deny the Petition and dismiss the action with prejudice.

I.

SUMMARY OF PROCEEDINGS

A. State Court Proceedings

In 1997, Petitioner was convicted by a Los Angeles County Superior Court jury of assault on a child causing death. (Clerk's Transcript ("CT" 480-81.) The trial court sentenced Petitioner to 15 years to life in prison. (CT 483-84.)

Petitioner appealed to the California Court of Appeal, which affirmed the conviction and sentence. (Answer to Petition for Writ of Habeas Corpus ("Answer"), Exhs. A and B.) He then filed a petition for review in the California Supreme Court, which was denied. (Answer, Exhs. C-D.) Petitioner did not seek collateral review in the state courts.

B. Federal Court Proceedings

Thereafter, Petitioner, proceeding pro se, filed a habeas corpus Petition, pursuant to 28 U.S.C. § 2254, and, later, an amended habeas corpus Petition, raising the following claims:

1. There was insufficient evidence to prove that the victim died of shaken baby syndrome.
2. There was insufficient evidence to prove that the victim died while in the "care and custody" of Petitioner.
3. The trial court violated Petitioner's right to effective assistance of counsel and a fair trial.

4. The cumulative effect of the errors at Petitioner's trial violated her right to a fair trial.

(First Amended Petition for Writ of Habeas Corpus ("Petition") at 6-7 (including the attached pages hereinafter referred to as 6(1) through 6(34)).)

After Respondent filed an Answer and Petitioner filed a Traverse, the Court appointed counsel for Petitioner. Petitioner's counsel then filed a Supplemental Memoranda of Points and Authorities in Support of Writ of Habeas Corpus ("Supp. P&A") and a Supplemental Traverse ("Supp. Traverse"). Respondent filed a Supplemental Memorandum of Points and Authorities in Support of Answer to Petition for Writ of Habeas Corpus ("Supp. Answer").

II.

STATEMENT OF FACTS[1]

This tragic case centers on the death of a seven-week old infant Etzel Smith ("Etzel"), and the conviction of Petitioner, his grandmother, for killing him. On October 10, 1996, Petitioner's daughter, Tomeka Smith ("Tomeka"), gave birth to Etzel. He was her third child. On November 29, 1996, Petitioner, Tomeka, and Tomeka's children spent the day with Petitioner's sister, Renee Townsend, at Townsend's apartment. Townsend's children were also in the apartment that day.

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[1] The facts contained in this section are taken from the appellate court's decision and supplemented with additional facts from the record.

Etzel seemed normal that day, eating well, smiling, and moving his arms and legs. That evening, Tomeka fed Etzel, changed his diaper, washed him, and put him to sleep on his stomach on Townsend's living room sofa around 11:30 p.m. After putting Etzel down, Tomeka went into Townsend's room to listen to music and fell asleep, with the bedroom door ajar.

Townsend left for work when Tomeka put Etzel to sleep. Petitioner lay down to sleep on the living room floor near the couch where Etzel lay. Tomeka's other two children were also sleeping in the living room. Townsend's children slept in another room in Townsend's apartment that night.

In the early morning hours of November 30, 1996, Petitioner rushed into Townsend's bedroom holding Etzel and woke up Tomeka. Etzel was limp and appeared to have vomit coming out of his nose. Petitioner told Tomeka something was wrong with Etzel and she should call 911.

Firefighters responded to Townsend's apartment, arriving at 3:36 a.m. When they got there, they found Etzel on the bed in Townsend's bedroom. He was dressed and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive him, without success. An ambulance arrived and took Etzel to the hospital, where he was pronounced dead.

In accordance with standard procedure, Etzel's death was initially declared to be from sudden infant death syndrome ("SIDS") because there were no obvious signs of trauma. After an autopsy was

completed, however, the coroner concluded that the cause of death was not SIDS, but rather shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and Petitioner that the cause of death had been determined to be shaken baby syndrome. Reusser then asked what had happened on the night Etzel died. Petitioner told her that Etzel's brother had awakened about 3:20 a.m. and that Petitioner had gone to comfort him. She later went over to the sofa and saw that Etzel was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a jostle" to awaken him. Petitioner demonstrated for Reusser how she had picked up Etzel under the armpits and given him what Reusser described as "a quick jostle," which was a smooth, rather than a jerky motion. Petitioner told Reusser that Etzel's head flopped back when she picked him up and he did not respond to her calls. At that point, Petitioner stopped talking.

Reusser asked Petitioner, "What happened next?" And Petitioner said, "Oh, my God. Did I do it? Did I do it? Oh, my God." Reusser then told Tomeka that she was going to remove her other two children from the home while authorities conducted an investigation into Etzel's death.

Los Angeles police officers interviewed Petitioner on December 9, 1996. In the interview, Petitioner told the officers that Etzel was fine when she went to sleep on the night of November 29. She explained that, early the next morning, one of Tomeka's other sons fell onto Petitioner, waking her. Petitioner then noticed that Etzel needed to have his diaper changed.

When Petitioner picked him up, his head flopped back and she noticed he had vomit around his mouth. Petitioner at first told police she shook Etzel ("just a matter of a few seconds"). Petitioner then corrected herself and said that she had twisted him to try to elicit a response.

Tomeka was also interviewed by police. She told them that Petitioner had told her that during the night Etzel had fallen from the couch (a distance of 18 inches) to the carpeted floor, but had been fine, and so Petitioner had put him back to sleep on the couch.

At trial, in addition to the facts outlined above, the prosecution called two doctors who worked at the coroner's office, both of whom worked on Etzel's autopsy and concluded he had died from shaken baby syndrome. Defendant produced two doctors, one of whom opined Etzel had died from SIDS and another who concluded there was insufficient evidence to determine exactly what caused Etzel's death. In its rebuttal case, the prosecution called a third doctor who also concluded Etzel had died from being shaken.

III.

STANDARD OF REVIEW

The standard of review in this case is set forth in 28 U.S.C. § 2254:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2554(d).

Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decided a case differently that the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Id.* at 413. To merit relief under this clause, the state court decision must be objectively unreasonable, not just incorrect or erroneous. *Id.* at 409-10, 412.[2]

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[2] The claims raised in the instant Petition were raised before the California Supreme Court, but that court did not issue a written opinion. Nevertheless, "[w]here there has been one reasoned state judgment rejecting a federal claim, [federal courts are to presume] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same

(continued...)

IV.

DISCUSSION

A. Sufficiency of the Evidence: Assault on a Child

In Ground One, Petitioner challenges the sufficiency of the evidence to convict her of committing assault on a child causing death. (Petition at 6-7.) This claim is without merit.

Due process prohibits a person from being convicted of a crime unless he has been found guilty of every fact necessary to establish the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 365 (1970); *Spivey v. Rocha*, 194 F.3d 971, 977 (9th Cir. 1999). The United States Supreme Court established in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979), that federal habeas corpus relief is not available to a petitioner who claims that the evidence was insufficient to support her conviction unless she can show that, considering the trial record in a light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." This Court must presume, even if it does not affirmatively appear in the record, that the jury resolved any conflicting inferences in favor of the prosecution. *Wright v. West*, 505 U.S. 277, 296-97

(...continued)
ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Thus, this Court will consider the reasoning of the California Court of Appeal, which addressed Petitioner's contentions in a written decision, to determine whether the California Supreme Court's decision is contrary to, or an unreasonable application of, federal law.

(1992); *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000).

Petitioner claims that the medical injuries sustained by Etzel were not consistent with shaken baby syndrome and, therefore, the evidence presented a trial was insufficient to support her conviction. (Petition at 6(1)-6(6); Supp. P&A at 21-43.) Specifically, Petitioner contends that, because there was no evidence of retinal hemorrhaging or significant external injuries, there was insufficient proof that Etzel died from shaken baby syndrome. (Supp. P&A at 21-43.)

Under California Penal Code § 273ab:

> Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in a the child's death . . . [is guilty of assault].

Cal. Pen. Code § 273ab.

There is no dispute that Petitioner was the only adult and the only one awake in the room with Etzel the night he died. There is also no dispute that she picked up Etzel and at the very least shook him to try to rouse him when he appeared to be unconscious. Further, three medical experts testified that Etzel died of shaken baby syndrome. Finally, in at least one interview with authorities after Etzel's death, Petitioner made statements that could be interpreted as admissions of guilt, *i.e.*, "Did I do it?" This is sufficient evidence to convict Petitioner under § 273ab.

In her briefs to this Court, Petitioner cites numerous medical articles and studies which indicate that detectable physical injuries, such as retinal hemorrhaging, bruises, broken bones, and neck trauma, usually accompany a case of shaken baby syndrome. She argues that the government's expert witnesses were not as qualified as Petitioner's. She contends that the Court should reject the opinions of the government's experts and adopt the views expressed by her own. But it is not for this Court in a habeas proceeding to re-examine the medical evidence and determine which evidence the jury should have accepted and which it should have rejected. Nor is it this Court's place to conduct a *de novo* review of the medical literature and decide what that evidence means to the Court. The jury was presented with the medical evidence--both the evidence from the prosecution's three doctors that Etzel died from being shaken and the evidence from Petitioner's two doctors that the evidence did not establish that Etzel died from being shaken. The jury, apparently, accepted the testimony of the prosecution's experts and rejected the testimony of Petitioner's. This Court is not a liberty to substitute its judgment in place of the jury's based on Petitioner's argument that her version of what happened should have been accepted by the jury. The Court also rejects Petitioner's arguments that the jury should have interpreted the evidence differently or that the medical evidence and literature support a different result.

In rejecting Petitioner's arguments that the evidence was insufficient, however, the Court is not suggesting that it does not recognize what a tragedy this case is. First and foremost, a seven-week old baby was taken from this world without ever having

a chance to enjoy the life that he was given. Second, his grandmother now sits in prison serving a 15-years-to-life sentence for causing his death. The evidence in this case, though clearly sufficient to support a conviction, raises many questions. This is not the typical shaken baby case. Grandmothers, especially those not serving as the primary caretakers, are not the typical perpetrators. Further, Petitioner was helping her daughter raise her other children (a 2-year-old and a 14-month-old) and there was no hint of Petitioner abusing or neglecting these other children, who were in the room with Etzel when he died. Still further, there was no evidence of any precipitating event that might have caused Petitioner to snap and assault her grandson. She was not trapped in a hopeless situation with a child she did not want or love. Nor was she forced to single-handedly care for a baby that had been crying all day and all night. In fact, there is no evidence that Etzel was doing anything other than sleeping the night he died. In addition, Petitioner's daughter, Etzel's mother, was in the room next door when Etzel died. The medical evidence was not typical either, in that some of the telltale signs usually found in shaken baby cases did not exist in this case. It was for these reasons that the Court appointed counsel in this case. Yet, despite the commendable effort of counsel, the Court is left with the firm conviction that, under the law governing habeas corpus, Petitioner's conviction is not contrary to the Constitution or the laws of the United States and her Petition must be denied.

B. Sufficiency of the Evidence: Care or Custody of Etzel

In Ground Two, Petitioner claims there was insufficient evidence to prove that Etzel died while in her "care and custody." (Petition at 6(7)-6(13).) This claim is equally unavailing.

Under § 273ab, assault on a child causing death requires that the defendant "hav[e] the care or custody of a child" at the time of the assault. Cal. Penal Code § 273ab. The term "care or custody" however, is not defined in the statute. Petitioner argues that she did not have care or custody of Etzel on the day he died, but, instead, that Etzel was in the care and custody of his mother, Tomeka Smith, who was sleeping in the room next door.

The California Court of Appeal concluded that there was "ample evidence" that Etzel was under Petitioner's care and custody at the time of the assault. It found:

> [Petitioner] was the only adult in the living room with Etzel. She cared for him when he woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody element of the offense.

(Answer, Exh. B at 114.) This Court agrees. The evidence was undisputed that Petitioner was the only adult sleeping in the room with Etzel, that Petitioner rocked the baby back to sleep after he awoke in the middle of the night, and that Petitioner picked him up to change his diaper when she noticed Etzel stopped breathing. (RT 262-67, 377-81, 923-26.)

Based on this undisputed evidence, a rational jury could have concluded beyond a reasonable doubt that Petitioner had care and custody of Etzel at the time of his death. Accordingly Petitioner is not entitled to habeas relief on this ground.

C. Fairness of the Trial

In Ground Three, Petitioner claims that the trial judge violated her right to effective assistance of counsel and a fair trial by engaging in a "pattern of disparagement" of defense counsel and defense witnesses. (Petition at 6, 6(13), 7.) Petitioner alleges the following 12 acts of impropriety by the trial judge evidenced judicial bias: (1) expressing displeasure at the length of defense counsel's opening statement; (2) correcting defense counsel as to the applicable standard of proof; (3) showing greater impatience with defense counsel than with the prosecutor; (4) refusing to hear defense counsel's arguments in support of an objection; (5) commenting to defense counsel, "just don't get lost"; (6) commenting to defense counsel, "I will make the rulings, not you"; (7) commenting to defense counsel, "keep your comments to yourself"; (8) commenting to defense counsel, "you had her leaving for the last 10 minutes. Would you move onto something relevant"; (9) commenting to defense counsel, "you have had her on the witness stand for an hour"; (10) refusing to hear defense counsel's argument on the admissibility of a piece of evidence, calling it "totally improper"; (11) cutting off defense questioning; and (12) bolstering the qualifications of the prosecution's expert witnesses, while simultaneously denigrating

equally qualified defense experts. (Petition at 6(16)-6(33).) There is no merit to this claim.[3]

The right to a fair trial is a basic requirement of due process and includes the right to an unbiased judge. *Haupt v. Dillard*, 17 F.3d 285, 287 (9th Cir. 1994) (*citing In re Murchison*, 349 U.S. 133, 136 (1955)). Furthermore, a judge should endeavor to "avoid even the appearance of advocacy or partiality." *United States v. Harris*, 501 F.2d 1, 10 (9th Cir. 1974). A judge is, however, "more than a moderator or umpire" and may properly "participate in the examination of witnesses for the purpose of clarifying the evidence, confining counsel to evidentiary

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[3] Respondent argues that this claim is procedurally defaulted by an independent and adequate state bar--namely, Petitioner's failure to object at trial. (Answer at 19-20.) In order for a claim to be procedurally defaulted for federal habeas corpus purposes, the opinion of the last state court rendering a judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989). Although the California Court of Appeal did state that Petitioner had waived any trial court misconduct claims to which he failed to object, the state appellate court merely noted that Petitioner objected "in some instances, but not in all." (Answer, Exh. B at 114.) The California Court of Appeal did not clarify in which instances Petitioner made a sufficient objection to preserve the issue for appellate review and in which instances the claim had been waived. (Answer, Exh. B at 114.) Under these circumstances, this Court does not find the appellate court's order to be sufficiently clear to warrant a procedural default. *See Valerio v. Crawford*, 306 F.3d 742, 773 (9th Cir. 2002) (holding a procedural default based on an ambiguous order is not sufficient to preclude federal collateral review), *cert. denied sub nom. McDaniel v. Espiredion Valerio*, 123 S. Ct. 1788 (2003).

rulings, controlling the orderly presentation of the evidence, and preventing undue repetition of testimony." *United States v. Mostella*, 802 F.2d 358, 361 (9th Cir. 1986). A defendant will be denied a fair trial "only if the record discloses actual bias on the part of the trial judge or leaves the reviewing court with an abiding impression that the judge's remarks and questioning of witnesses projected to the jury an appearance of advocacy or partiality." *Id.* (internal quotation marks omitted). The question a court must ask on habeas review is "whether the state trial judge's behavior rendered the trial so fundamentally unfair as to violate federal due process under the United States Constitution." *Duckett v. Godinez*, 67 F.3d 734, 740 (9th Cir. 1995).

Here, Petitioner does not suggest and the record does not reflect that the trial judge was actually biased against her and her counsel. Rather, Petitioner contends that the trial judge's disparaging remarks and actions toward defense counsel gave the appearance of partiality, thereby undermining Petitioner's defense. The California Court of Appeal examined each of the 12 alleged acts of impropriety by the trial judge and found no error. (Answer, Exh. B at 114-24.) Although the appellate court noted that a few of the trial judge's remarks expressed "impatience" with counsel and, more properly, should have been done at sidebar, it concluded that the rulings themselves were legally correct and well within the trial judge's rightful discretion to control the proceedings. (Answer, Exh. B at 114-24.)

This Court agrees. Several of the trial judge's alleged improprieties were appropriate instances of judicial intervention, necessary to maintain the orderliness of the proceedings. For example, when

defense counsel interrupted the judge prior to the court's ruling on a defense objection, the judge properly admonished defense counsel: "I will make the rulings, not you." (RT 811.) Similar acts by the trial judge do not suggest judicial bias or partiality but rather demonstrate the judge's proper control over the proceedings. *See Mostella*, 802 F.2d at 361.

Petitioner also argues that the trial judge's rulings on the admissibility of certain evidence indicate judicial bias. "Judicial rulings alone[, however,] almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Here, Petitioner has not demonstrated that any of the trial judge's rulings were incorrect, let alone indicative of bias.

Similarly, this Court cannot conclude that any disparate treatment of the expert witnesses by the trial judge amounted to a due process violation. For example, after defense counsel was allowed to voir dire Dr. Eugene Carpenter, one of the prosecution's expert witnesses, regarding his qualifications as an expert on shaken baby syndrome, the trial judge commented, "He is certainly qualified as to his training." (RT 547-49.) During its rebuttal case, the prosecution proffered another expert witness on shaken baby syndrome, Dr. David Chadwick. After defense counsel was given extensive opportunity to conduct voir fire on Dr. Chadwick, the trial judge allowed him to testify, stating, "He is well qualified." (RT 1433-38.)

When the prosecutor objected to the qualifications of defense expert Dr. William Goldie, the trial judge stated that his "qualifications . . . [went] to the weight of his testimony." (RT 971.) This comment

was not disparaging, but simply informed the jury that Dr. Goldie's experience should be considered in deciding what weight his testimony should carry. After further objection from the prosecutor, the trial judge conducted its own voir dire and subsequently allowed Dr. Goldie to testify as an expert. (RT 971-73.)

In sum, the trial judge's comments about the experts were not improper and did not unfairly prejudice Petitioner.[4] Petitioner's argument to the contrary is rejected.

Finally, the Court notes that the trial judge at times expressed her dissatisfaction with defense counsel regarding the pace of the proceedings. Some of the comments directed toward counsel may have been more appropriately made outside the presence of the jury. Nevertheless, considering the fact that the trial lasted nearly three weeks, this Court is not left with an abiding impression that these isolated comments by the trial judge gave an appearance of advocacy or partiality.[5] Furthermore, any possible taint caused by the trial judge's comments was overcome by her admonition to the jurors at the close of the trial that they form their own conclusions regarding the evidence, the witnesses, and the guilt

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[4] At the conclusion of the trial, outside the jury's presence, the trial judge told Petitioner and her defense counsel that, although he felt Dr. Goldie was not a helpful witness, Dr. Richard Seigler, a second defense expert witness, "was very impressive." (RT 1649.)

[5] Opening statements were given on November 12, 1997, and closing arguments were given on December 3, 1997. (CT 390, 419.)

of the defendant.[6] Having reviewed the trial record, the Court finds that the trial judge's comments to Petitioner's counsel did not render Petitioner's trial so fundamentally unfair as to violate due process. *See Duckett*, 67 F.3d at 740. Accordingly, as to this claim, Petitioner is not entitled to habeas relief.

D. Cumulative Error

Finally, Petitioner claims that the cumulative effect of the errors in Grounds One, Two, and Three deprived her of due process of law and a fair trial. (Petition at 7.) The cumulative effect of multiple trial errors may prejudice a defendant to the extent that his conviction must be overturned; however, where there is no single constitutional error, as here, "there is nothing to accumulate to a level of a constitutional violation." *Mancuso v. Olivarez*, 292 F.3d 939, 957 (9th Cir. 2002); *see also Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (finding the "collective presence" of "several substantial errors" was prejudicial), *cert. denied*, 537 U.S. 1179 (2003). Because Petitioner has not demonstrated

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[6] The jury was instructed as follows:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion.

(CT 468.)

constitutional or substantial error in any of her individual claims, her cumulative error claim fails as well. Accordingly, Petitioner is not entitled to habeas relief.

V.

RECOMMENDATION

For the foregoing reasons, the California courts' denial of Petitioner's claims was neither contrary to nor an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). Accordingly, IT IS RECOMMENDED that the District Court issue an Order (1) accepting and adopting this Report and Recommendation and (2) directing that judgment be entered dismissing the Petition with prejudice.

DATED: March 22, 2004.

/S/

PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

APPENDIX J

SUPREME COURT
FILED

MAY 10 2000

Frederick K. Ohlrich Clerk

DEPUTY

Second Appellate District, Division Four,
No. B118869

S086698

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Respondent

v.

SHIRLEY REE SMITH, Appellant

Appellant's petition for review DENIED.

GEORGE

Chief Justice

APPENDIX K

COURT OF APPEAL – SECOND DIST.
FILED
FEB 10, 2000
JOSEPH A. LANE CLERK
DEPUTY CLERK

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SHIRLEY REE SMITH, Defendant and Appellant.	B118869 (Super. Ct. No. LA026210)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene E. Schempp, Judge. Affirmed as modified.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc J.

Nolan and Peggie J. Bradford, Deputy Attorneys General, for Plaintiff and Respondent.

Shirley Ree Smith appeals from her judgment of conviction by jury trial of assault on a child causing death (Pen. Code, § 273ab).[1] She challenges the sufficiency of the evidence to establish the cause of the infant's death and that she had the custody and control of the child at the time of the crime. She argues that the trial court deprived her of a fair trial by repeated disparaging comments about her trial attorney and that the trial court showed favoritism toward the prosecution. She also contends that the trial court made improper comments about the expert witnesses, disparaging the defense experts and favoring the prosecution experts. The Attorney General argues that the judgment must be modified to impose a parole revocation fine under section 1202.45.

We conclude that the verdict is supported by substantial evidence, and that the comments of the trial court do not constitute a basis for reversal. We modify the judgment to impose the parole revocation fine, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

Appellant is the grandmother of Etzel, the infant victim in this case. At the time of Etzel's death, appellant shared an apartment with her brother, Stephen Keys; her daughter, Tomeka Smith;[2] and

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] We refer to Ms. Tomeka Smith as "Tomeka" to avoid

Tomeka's children, Yondale, Yolanda, and Etzel. Every day, appellant helped Tomeka care for Yondale, Yolanda and Etzel. At times, appellant, Tomeka, and Tomeka's children stayed with appellant's sister, Renee Townsend. Ms. Townsend had two children, Marcus and Marcellus.

Etzel was born on November 10, 1996 with jaundice and a heart murmur. Both conditions resolved before his death. On November 29, 1996, appellant, Etzel, Yondale, and Yolanda spent the day at Ms. Townsend's apartment. Etzel seemed normal that day, eating well, smiling, moving his arms and legs, and having normal urination and bowel movements. That night, at the Townsend apartment, Tomeka put Etzel to sleep on his stomach on the sofa in the living room after feeding, changing and washing him. Yondale also slept on the sofa. Yolanda slept on a love seat in the same room. Appellant slept on the floor near the sofa. Ms. Townsend left for work when Tomeka put Etzel down to sleep. Marcus and Marcellus slept in their bedroom.

Usually, when staying at the Townsend apartment, Tomeka also slept in the living room. But on the night of November 29, 1996, she went into Ms. Townsend's room to listen to music and fell asleep. Etzel was fine as of 11:30 p.m. when Tomeka put him down to sleep.

In the early morning hours of November 30, 1996, appellant rushed into the bedroom holding Etzel and wakened Tomeka. Etzel was limp and appeared to have vomit coming from his nose. Appellant said:

(...continued)
confusion with her mother.

"Tomeka, Tomeka. Something is wrong with Etzel. . . . [C]all 911." Appellant handed the baby to Tomeka and Tomeka called 911.

Firefighters received the call and responded to the apartment, arriving at 3:36 a.m. Etzel was clothed, lay on the bedroom bed, and had bright red blood in one nostril. He was warm, but was not breathing and his heart was not beating. The firefighters began cardiopulmonary resuscitation and other efforts to revive the baby, without success. An ambulance arrived to transport Etzel to the hospital. Shortly after he arrived at the hospital, Etzel was declared dead.

When an infant dies without obvious signs of trauma, it is standard procedure to declare the death as a Sudden Baby Death Syndrome (SIDS) case, pending autopsy. (We reserve the specific details of the autopsy results for our discussion of appellant's challenge to the sufficiency of the evidence.) After the autopsy was completed, the coroner concluded that the cause of death was not SIDS, but shaken baby syndrome.

On December 5, 1996, a social worker, Linda Reusser, went to the Townsend apartment and told Tomeka and appellant that the cause of death had been changed to shaken baby syndrome. Ms. Reusser asked what had happened. Appellant told her that Yondale had wakened about 3:20 on the morning of November 30, and that she had gone to comfort him. She went over to Etzel and saw he was face down. She touched him and he did not respond. Worried, she picked him up and gave him "a little shake, a ostle" to waken him. Etzel's head was flopped back when she picked him up. He did not respond.

Appellant demonstrated for Ms. Reusser that she had picked Etzel up under the armpits with her hands even with her shoulders, and gave him what Ms. Reusser described as "a quick jostle" which was a smooth rather than a jerky motion. At that point, appellant stopped talking.

Ms. Reusser said: "Shirley, what happened next?" Appellant said something like: " 'Oh, my God. Did I do it? Did I do it? Oh, my God.' " Ms. Reusser told Tomeka that she was going to remove Yondale and Yolanda from the home while an investigation was conducted.

Los Angeles police officers interviewed appellant on December 9, 1996. She said that Etzel was fine at 11:30 on the night of November 29th. Yolanda fell onto appellant and woke her. Appellant noticed that Etzel needed to be changed, and when she picked him up, his head flopped back and he had vomit around his mouth. At first, appellant said she shook Etzel, and then corrected herself and said that she had twisted the baby to try to elicit a response from him. She said that she shook Etzel for "just a matter of a few seconds." Tomeka told Detective Nancy Nelson that appellant had said that Etzel had fallen earlier in the evening, was fine, and was put back to sleep on the couch.

Appellant was arrested and charged with one count of assault on a child causing death (§ 273ab). At trial, both the prosecution and the defense presented the testimony of medical experts regarding the cause of Etzel's death. We review that testimony in detail in our discussion of appellant's challenge to the sufficiency of the evidence. Appellant was

convicted as charged. She was sentenced to a term of 15 years to life in prison. She filed a timely appeal.

DISCUSSION

I

Appellant challenges the sufficiency of the evidence to support her conviction. The standard of appellate review is well established. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People* v. *Bolin* (1998) 18 Cal.4th 297, 331.)

A

Appellant's first challenge is to the evidence of the cause of Etzel's death. She contends the evidence was not sufficient to establish that he died from shaken baby syndrome. She relies heavily upon various medical publications regarding shaken baby syndrome, which she concedes were not presented in evidence at trial. We decline to consider matters outside the record of the trial. (See *People* v. *Peevy* (1998) 17 Cal.4th 1184, 1207 ["[T]he general rule [is] that an appellate court generally is not the forum in which to develop an additional factual record, particularly in criminal cases when a jury trial has not been waived."].)

Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner, testified at trial that Etzel did not die from SIDS. He died from trauma. Dr. Carpenter explained that if death is from SIDS, there are no bruises, abrasions, or signs of internal trauma.

The autopsy revealed that Etzel had blood on the top of his brain, an abrasion on the lower left back of the head, and a bruise underneath the abrasion. The bruise was relatively small, and was not sufficient in itself to explain the cause of death. There was also a small amount of blood between the two halves of the brain. In addition there was a small amount of blood in the posterior fossa (at the base of the skull). There was also older blood which may have been a sign of an older injury which occurred days or weeks prior to death. There was no indication of heart or liver disease.

The autopsy also revealed hemorrhages of the optic nerves on both sides of the brain. The hemorrhages were recent. There was also subarachnoid and subdural hemorrhaging at the bottom of the brain. Dr. Carpenter explained that the dura is the thick covering of the brain and that the subarachnoid is a very thin cellophane-like covering of the brain itself.

Dr. Carpenter testified that the bleeding on top of Etzel's brain was caused by violent shaking so "there was a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore. [¶] And bleeding started at the top right part of the brain. And also the brain was so damaged from this

violent shaking that death occurred relatively quickly, within . . . 30 minutes. [¶] But there was no significant delay between the shaking and the brain damage. The bleeding was not much. [¶] There are two ways that . . . shaking to the head can cause death. One way is that the shaking itself is so severe that the brain tears in vital areas that control the heartbeat and the breathing. [¶] And then the bleeding can be small and won't amount to that much. [¶] The other way that a baby's body can die from shaking or from head trauma is for the vessels to tear, but for the brain not to be damaged that much. And for the blood to accumulate on top of the head. [¶] There is not enough room in the skull for the brain and the blood. So the brain is pressed downward into the spinal canal and is crushed and that dies."

Dr. Carpenter explained that in Etzel's case there was not enough blood to press the brain downward, and that death therefore was a result of direct trauma to vital areas of the brain before there was enough accumulation of blood to cause death from pressure on the brain. Dr. Carpenter said that he could not rule out the possibility of other blows to the head, but that there was no clear evidence of such blows except for the one small area of bruising. He testified that a fall from the sofa in the Townsend apartment could not account for the injuries to Etzel's head. He also said that the injuries could not have been caused by the administration of CPR. Dr. Carpenter testified that during the last moments of life in an infant there would be a release of feces and regurgitation of stomach contents. The jury was shown a diagram (People's Exh. 12) portraying a whiplash shake injury syndrome in an infant.

Dr. Carpenter testified that retinal hemorrhages are often seen in the bodies of infants who are the victims of shaken baby syndrome. There were no retinal hemorrhages in Etzel's eyes. There was evidence of old bleeding in the optic nerve on the right side of the brain.

On cross-examination, defense counsel established that Dr. Carpenter's trial testimony was inconsistent with his testimony at the preliminary hearing regarding whether he was present for the entire autopsy of Etzel, which was performed by Dr. Stephanie Erlich. Dr. Carpenter also testified on cross-examination that fractures are common in babies who have been shaken, but there were no fractures on Etzel. Dr. Carpenter said that subdural or subarachnoid hemorrhage could manifest in babies that suffer birth trauma. He also said that such injuries could result from a fall in which the baby strikes its head against an object.

Dr. Erlich, the autopsy surgeon, also testified. At the time she conducted the autopsy on Etzel, she was an associate deputy medical examiner. She was doing a one-year fellowship in forensic pathology to obtain board certification in that field. She was board certified as a neuropathologist and in anatomic pathology. She was certified as a clinical pathologist in 1996.

Dr. Erlich corroborated Dr. Carpenter's testimony about the autopsy findings on Etzel. She added that bilateral plural petechia were found in the lining around the lung. She explained that the subdural hemorrhages were found in the back of the head, the occipital area, and in the bottom of the skull. There was subarachnoid hemorrhaging in the occipital

areas, in both frontal areas, in the right parietal area, and on the left temporal lobe.

Dr. Erlich and Dr. Hidelo Itabashi performed a neuropathological examination on Etzel's brain. They confirmed the presence of fresh subarachnoid hemorrhages in the parietal areas, the occipital areas, the frontal areas, and in the left temporal area. They also confirmed the presence of fresh subdural hemorrhage in the parietal area, as well as an older subdural hemorrhage in the right parietal area. Dr. Erlich testified that the cause of death was trauma to the brain. On cross-examination, Dr. Erlich testified that this was her first autopsy on a victim of shaken baby syndrome. She said that the fresh blood found on Etzel's brain could not be the result of rebleeding from an earlier trauma. Dr. Erlich notified the police of the autopsy findings. On redirect, Dr. Erlich testified that the injuries to Etzel's brain could not have occurred as the result of shaking after death.

The defense presented testimony that neither of the firefighters who came to the apartment nor the investigator for the coroner saw trauma on Etzel's body. Rene Townsend testified that appellant only corrects the children verbally, does not have a temper, and that on the night of Etzel's death, everyone was in a festive Thanksgiving mood. She said that the social worker, Ms. Reusser, accused appellant of causing Etzel's death.

Dr. Richard Siegler testified that Etzel died from brain trauma, but that it was not the result of shaken baby syndrome because there was no retinal hemorrhaging. He disagreed with Dr. Carpenter and Dr. Erlich that death was the result of direct damage

to the brain. Dr. Siegler testified that the brain trauma was not something that happened just a few hours before death. He said there was no fresh trauma. He also testified that old bleeding tends to draw in new bleeding.

On voir dire, the prosecutor established that Dr. Siegler's extensive experience was not in forensic pathology, but in general, clinical and anatomic pathology. Ninety-five percent of his publications have been on cancer. He had not authored any articles dealing with child abuse or forensic pathology in determining the causes of death in infants. Although he had been a medical examiner in Philadelphia in 1960, shaken baby syndrome was unknown at that time. He had not been involved in any autopsies where the cause of death was found to be shaken infant syndrome. He had performed 50 autopsies on children with brain trauma over the last 25 years.

On cross-examination, Dr. Siegler said that he did not believe the cause of death was SIDS. After discussing an article on which Dr. Siegler had relied in his report for the defense, the prosecutor referred to a particular passage and asked: "So you would agree, then, Doctor, that just because there are no retinal hemorrhages that does not exclude that it is a shaken baby. Would you agree with that?" Dr. Siegler answered: "That's correct." He went on to say that you can diagnose shaken baby syndrome without a finding of retinal hemorrhages if there is a report that the baby was in fact shaken. He said that a diagram prepared by Dr. Carpenter and Dr. Erlich at trial showed that there was extensive fresh bleeding to the brain, which was not depicted in the neuropathologist's photographs of Etzel's brain. The

neuropathologist's photographs were the basis for Dr. Siegler's conclusion that death was caused by old trauma.

Dr. Erlich was called by the defense. She repeated her testimony that there was both old and new blood in the subdural area of Etzel's brain. She believed the cause of death was direct damage to the brain. She agreed that retinal hemorrhaging is present in 70 to 85 percent of shaken infant syndrome cases.

Dr. William Goldie, a pediatric neurologist, testified for the defense. He had spoken on survivors of shaken baby syndrome. He is not board certified in neuropathology, clinical pathology, or in forensic pathology. He testified that death from shaken baby syndrome is due to either massive swelling of the brain or massive bleeding to the brain. He also testified that the fact that Etzel had jaundice, a heart murmur, and low birth weight were factors to make an infant more disposed to dying from SIDS. He concluded that the pathologists had not been able to determine the cause of Etzel's death. He believed that some of the bleeding in the brain could be attributed to the resuscitation efforts. His conclusion was that Etzel died from SIDS.

The expert opinion evidence we have summarized was conflicting. It was for the jury to resolve the conflicts. The credited evidence was substantial and sufficient to support the jury's conclusion that Etzel died from shaken baby syndrome. The conviction is supported by substantial evidence.

B

Appellant also challenges the sufficiency of the evidence that she had Etzel in her care and custody within the meaning of section 273ab. That statute states: "Any person who, *having the care or custody of a child* who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life."[3]

Here there is ample evidence that Etzel was under appellant's care and custody at the time he was injured. Appellant was the only adult in the living room with Etzel. She cared for him when he woke earlier in the night, and she picked him up and examined him when she noticed that he was not well. This is sufficient to satisfy the care and custody element of the offense.

II

Appellant contends the trial court engaged in a pattern of disparagement of her trial counsel that resulted in the deprivation of her Sixth Amendment right to the effective assistance of counsel and her Fourteenth Amendment right to a fair trial.

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[3] The version of section 273ab in effect at the time of this offense provided for a sentence of 15 years to life. It was amended to provide for the 25 years to life term in 1996. (Stats. 1996, ch. 460, § 2.)

"A trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel . . . and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense . . . .' [Citations.]" (*People* v. *Fudge* (1994) 7 Cal.4th 1075, 1107.) The Attorney General argues that appellant failed to preserve this issue by objecting or requesting that the jury be admonished. We agree that appellant was required to object or to seek an admonishment to preserve the issue for appeal. (*Id.* at p. 1108.) As the following discussion points out, counsel did so in some instances, but not in all. We shall, in any event, examine each instance raised by appellant.

A

" '*An Hour's Opening Statement.*' "

The prosecutor's opening statement is reported in 16 pages of reporter's transcript. During the defense opening statement, when defense counsel was discussing the complicated medical evidence which we have summarized, the trial court said: "Mr. Eriye why don't you quit at that point. You have been going for an hour. My reporter is about to run out of paper and I told the jury, who has not had a recess, that we would recess at 3:30 today." Mr. Eriye responded that he would conclude in five minutes. The trial court said that defense counsel would be given an additional five minutes, after the reporter had put in new paper. After defense counsel had resumed his statement, with no sign of concluding, the trial court interrupted and said: "All right. I am going to recess. An hour's opening statement. And I am afraid that

five minutes won't do it." At that point, the defense opening statement was reported in 21 pages of reporter's transcript. The jury was admonished and excused at 3:35 p.m. The following morning, defense counsel concluded his opening statement, which is reflected in another five pages of reporter's transcript.

Appellant argues that the trial court's comment "made defense counsel appear to be so out of line with common practice that he was incompetent. This suggestion was discourteous and disparaging."

We disagree. It would have been better to have done this at sidebar, but misconduct is not shown. The trial court was merely exercising its power to control the trial. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

B

" '*That's not the legal definition.*' "

Near the conclusion of defense counsel's opening statement, he said: "So ladies and gentlemen of the jury, I thank you very much for giving me the time to hear. And I believe strongly that the experts and all the witnesses will clearly establish beyond a shadow of a doubt that--" At that point, the court interrupted and said "That's not the legal definition. It is beyond a reasonable doubt."

Appellant argues that the comment was inappropriate because defense counsel was not obligated to provide the legal definition of reasonable doubt. She contends: "Defense counsel was fully entitled to argue that he would prove beyond a

shadow of a doubt that his client was innocent, even though that would be far more proof than necessary to acquit the defendant."

We find no error. The trial court was within its discretion in ensuring that the jury was not confused by the defense counsel's use of a standard different from reasonable doubt.

C

Favoritism Toward the Prosecutor

Appellant argues that the trial court allowed the prosecutor to harass Tomeka Smith (the mother of the child), who testified as a defense witness. The issue in the colloquy cited was what Tomeka had told police officers about the incident, and whether she told them the truth to the best of her recollection. Appellant asserts that defense counsel was cut off when he challenged a police officer with making up a story about Tomeka's statement to him.

This is the colloquy at issue:

"[Defense Counsel]: Now, at the commencement of your testimony you started with a story of what Tomeka told you. You're trying to make up a story, correct?

"[The Prosecutor]: Your honor, we are going to object to that. It is argumentative and it is insulting to this officer and it is unnecessary."

The trial court sustained the objection. We find no error. This was the fourth question asked by defense counsel in his cross-examination of this officer.

Defense counsel had not raised any question about the veracity of the officer's account through inconsistencies or memory lapses. In contrast, during the prosecutor's examination of Tomeka, which is cited by appellant, Tomeka repeatedly said that she was unable to remember what she had said to the police. Under these circumstances, the trial court was not showing preferential treatment to the prosecution.

D

" *'I Won't Hear Your Argument.'* "

Before Dr. Carpenter began his testimony for the prosecution, counsel for the defense (outside the presence of the jury), objected to some of the diagrams the prosecutor planned to use with Dr. Carpenter. He said that some of the diagrams related to shaken baby syndrome and that there had been no evidence yet that Etzel had been shaken. The trial court said that it presumed that the diagrams would become relevant with the doctor's testimony, and that it did not understand how the defense could object until Dr. Carpenter had testified. The trial court said: "If he testifies and his testimony, for example, doesn't cover that one you're referring to, then it won't be received in evidence. But I don't know until I have heard his testimony."

The prosecutor said that Dr. Carpenter was going to say that what was depicted on the diagram is one of the ways in which infant whiplash shake injury syndrome occurs. The trial court ascertained that the prosecutor planned to use the diagram to assist the jurors in following Dr. Carpenter's testimony. The trial court asked how the coroner [Dr. Carpenter]

was going to testify about shaken baby syndrome. The prosecutor interrupted the court and said that Dr. Carpenter is an expert on shaken baby death. Defense counsel objected and said that Dr. Carpenter is not an expert, that he is a pathologist. The trial court said: "I don't know if it is true or not. But we will find out from his testimony. If he isn't I won't allow it in. If she establishes that he is an expert, it will probably be received. [¶] So let's see how the testimony goes before I rule on that."

After this colloquy, Dr. Carpenter testified to his credentials, including the fact that he is a board certified forensic, anatomic, and clinical pathologist. He also testified that he believed that the bleeding on the top of Etzel's brain was caused by violent shaking, which caused a whiplash action of his head. He testified in detail about how shaking a baby can cause death.

After this testimony was given, the prosecutor started to use a chart, which was marked as People's 12. Apparently this is the same diagram to which defense counsel had objected earlier, because he renewed his objection. The trial court said: "Counsel, I won't hear your argument. Isn't this something we took up outside the presence of the jury? I think it is." The prosecutor said: "Yes, it is, Your Honor."

Appellant fails to cite or quote the remainder of the record on this point. In it, the prosecutor went on to lay additional foundation regarding Dr. Carpenter's expertise in the area of shaken infant syndrome before using the chart. After these foundational questions were answered, the prosecutor asked the trial court if it was satisfied. The trial court said yes, and offered counsel for

appellant an opportunity to voir dire Dr. Carpenter on his experience with shaken infant syndrome. After defense counsel had asked Dr. Carpenter several questions regarding his qualifications, he asked a substantive question regarding how long it would take a child to die from shaking and how this would be manifested. At that point, the trial court interrupted counsel and said that this question was beyond the scope of proper voir dire and should be reserved for cross-examination. The trial court ruled that Dr. Carpenter was qualified and allowed the prosecutor to use the diagram in her continued examination.

There was no disparagement of counsel. The trial court properly allowed counsel for the defense to voir dire Dr. Carpenter about the subject matter of the diagram and found that Dr. Carpenter was qualified to testify as an expert witness.

E

"'*Counsel, Just Don't Get Lost.*'"

During cross-examination of Dr. Carpenter, defense counsel asked a series of questions relating to differences between Dr. Carpenter's trial and preliminary hearing testimony. Defense counsel then asked a series of questions regarding a statement made by Dr. Carpenter to an investigator for the defense. Counsel asked if Dr. Carpenter told the investigator that he had found the bruise on Etzel's head before the autopsy began (this was contrary to Dr. Carpenter's trial testimony). Dr. Carpenter said that he had not said that. He explained: "He [the investigator] asked me what was my memory. I told him my memory, and my memory was that I had

found the abrasion at the beginning of the autopsy. [¶] And I had alerted Dr. Erlich that something might be going wrong with this case and that I had stayed there. [¶] But that was not an accurate memory. As Dr. Erlich when asked her memory had a different one, plus she had . . . documentation as to which memory was correct."

Defense counsel then said: "I am a little bit lost here. What you're referring to memory--" The trial court interrupted and said: "Counsel, just don't get lost. He's answered the question. Ask another question."

Appellant argues that the trial court's statement was harsh and unprovoked. We disagree. The trial court was properly exercising its discretion to control proceedings. (*People* v. *Fudge*, *supra*, 7 Cal.4th at p. 1108.)

F

" '*Counsel, I will make the rulings, not you.*' "

During the direct examination of Dr. Erlich, counsel for the defense objected to a question on the ground that it misstated the evidence. The prosecutor said: "I will restate the question. I don't know if that misstates the testimony or not, but I will restate the question, Your Honor." Counsel for appellant interjected: "It does." The trial court said: "Counsel, I will make the rulings, not you."

Appellant argues that the trial court could have admonished the prosecutor, but only criticized defense counsel. The trial court properly admonished defense counsel. His comment was inappropriate.

G

" *'Counsel, keep your comments to yourself.'* "

Detective Michelle Robinson of the Los Angeles Police Department testified that she and Detective Nancy Nelson interviewed appellant. A hearing pursuant to Evidence Code section 402 was conducted to determine whether the tape recording of appellant's statement should be excluded because she was not admonished under *Miranda* v. *Arizona* (1966) 384 U.S. 436. The attorneys argued their positions and the trial court ruled that the tape was admissible. Counsel for appellant expressed a concern that portions of the tape recording were not reflected in the written transcript. The trial court said that the jury would be admonished to listen to the recording and would not be given the written transcript.

Before the tape was played to the jury, the trial court told defense counsel that if he had any specific objections to portions of the tape, he should make sure that the portions were excised. The trial court also told counsel for defense to object if he heard a statement on the tape that is not in the written transcript. The trial court said that the jury would be admonished that the transcript was an aid to assist them, but that the tape is the actual testimony, and that the tape would be allowed in the jury room.

The following morning, counsel for the defense asked for a sidebar before the tape of appellant's statement was played to the jury. At sidebar, the trial court noted that it had been "inundated from notes from jurors they are having a time problem . . . ." Counsel for the defense strongly

objected to the playing of the tape. He asserted that a substantial portion of the tape had been omitted from the written transcript. The trial court indicated that the jury would not be allowed to use the written transcript. The prosecutor objected, saying that she had asked counsel weeks before to give her his version of the transcript so the two could be incorporated. Counsel for defense stated that the prosecutor had given him an updated transcript only the day before toward the end of the court session. The trial court told counsel for the defense to furnish the transcript. It said that the jury would be admonished that the transcript was an assist, and that they might receive a second transcript, and would be asked to determine which was correct.

The trial court admonished the jury not to read ahead in the transcript, that defense counsel disagrees with the transcription and has a right to prepare a version which he believes is correct, and that it would be up to the jury to decide what the tape said. The trial court told counsel that if he disagreed with a portion of the transcript, he could object and the tape would be stopped and the detective would be asked if she recalled what was said in the interview. Counsel for the defense said that this procedure was "fine."

After the tape was played, counsel for the defense objected on the grounds of Evidence Code sections 350, 352, 930 and 940. The trial court overruled the objections. In the presence of the jury, after both defense counsel and the prosecutor continued to discuss the tape, the trial court said: "Counsel, keep your comments to yourself. We have taken up proceedings outside the presence of the jury and you know better than that."

Later, during another colloquy at the bench, the trial court said: "[Y]our objections to 930 and 940 we addressed I believe yesterday. It is not a violation of her privilege against self-incrimination and it's clearly admissible."

In her brief, appellant argues that her counsel's comments were proper, and that he was following the court's direction to raise objections as the relevant portion of the tape was being played. We disagree. The Evidence Code objections made by counsel went to the entire tape, rather than to specific portions. The trial court had heard extensive argument following the Evidence Code section 402 hearing on the admissibility of the recording. Counsel should have raised these arguments at that time. The trial court was properly controlling the course of the trial, particularly in light of the jury's concerns about the length of the trial.

H

" '*Counsel you had her leaving . . . .*' "

During his examination of Rene Townsend, defense counsel asked a series of questions about the social worker's visit to the apartment, and her departure with the children. After several questions about the social worker's departure, counsel for the defense began to ask another question in this area. The trial court interrupted and said: "Counsel you had her leaving for the last 10 minutes. Would you move onto something relevant." The trial court had sustained a number of objections to questions regarding the relevance of the social worker's removal of the other children from the Townsend apartment.

While the trial court's language reveals some impatience, the court was correct that this line of questioning was not relevant. We find neither error nor prejudice.

I

Comment Regarding Examination of Ms. Townsend

Appellant complains that at the conclusion of his direct examination of Ms. Townsend, the trial court said: "One final question and then--you have had her on the witness stand for an hour." We observe that this admonition came after the trial court sustained the prosecution's objections to a series of questions by the defense regarding Ms. Townsend's opinion as to whether appellant would harm the baby. The trial court acted within its authority to control the trial in making its comment to defense counsel.

J

The Daily News Article

As we have noted, the defense recalled Dr. Erlich in its case. During his questioning of this witness, counsel attempted to use an article from the Daily News newspaper. The trial court indicated that it did not seem relevant, but asked to see the article. The prosecutor objected to the article on the grounds of relevance and hearsay. The trial court then sustained the prosecution's objections. It stated that the use of the article is "totally improper" and would not hear argument on it.

The article was not marked as an exhibi and we do not have a copy of it in the record. Appellant

argues that the trial court should not have said that it was "totally improper." Even if the trial court's comment was too harsh, we see no prejudice.

K

Limitations on Defense Examination

Appellant argues that the trial court improperly cut off questioning of Dr. Erlich about the amount of blood present during the autopsy, and how she kept her notes clean. The trial court precluded counsel for the defense from redirect on the subject of Dr. Erlich's statements to the police because this was not within the scope of cross-examination. The ruling appears to be correct. Even if the questions could be regarded as within the scope, it is not likely that it prejudiced the result of the trial.

L

Unfairly Sustained Objections

Appellant argues that the trial court improperly sustained objections to his examination, while granting wider latitude to the prosecution. We have reviewed the instances cited and find no error or improper disparagement. We conclude that appellant was given a fair trial.

We note that the trial court subjected the prosecutor to similar treatment.

III

Appellant argues that the trial court improperly required a greater showing to qualify the defense

doctors as expert witnesses than it did to qualify the prosecutor's experts. We disagree.

We have already discussed Dr. Carpenter's qualifications as a board certified forensic, anatomic, and clinical pathologist. These qualifications were sufficient to establish his expertise.

Appellant argues that Dr. Goldie should not have been subjected to such extensive voir dire on his qualifications. On voir dire, the prosecutor established that he was not board certified in pathology, neuropathology, clinical pathology, or forensic pathology. He had worked in neuropathology only as a resident. In light of this testimony, more intensive voir dire of Dr. Goldie regarding his expertise on brain trauma to children was appropriate.

IV

Appellant argues that she was denied her right to a fair trial because of the cumulative errors she raised in her brief. We have found no error. Therefore, the argument cannot prevail.

V

Respondent asks this court to modify the judgment because the trial court failed to impose the mandatory parole revocation fine pursuant to section 1202.45.[4] Section 1202.45 requires the court to

---

[4] The issues of whether the failure of a trial court to impose a mandatory fine can be addressed on appeal when it was not raised during trial, and whether an appellate court can impose

(continued...)

impose a fine in the same amount as that imposed under section 1202.4. We agree that the failure to impose the fine renders the sentence unauthorized. (See *People* v. *Scott* (1994) 9 Cal.4th 331, 354.) Appellant was ordered to pay a restitution fine of $1,000 under section 1202.4, subdivision (8). In the interest of judicial economy, we impose the parole revocation fine rather than remand the case to the trial court. (*People* v. *Hong* (1998) 64 Cal.App.4th 1071, 1084; *People* v. *Walker* (1991) 54 Cal.3d 1013, 1029.)

We modify the judgment to reflect the additional fine of $1,000 required by section 1202.45. That fine is suspended unless and until appellant's parole is revoked.

DISPOSITION

The judgment is modified to impose and suspend a $1,000 parole revocation fine under section 1202.45. In all other respects, the judgment is affirmed.

(...continued)
the minimum fine rather than remand the case to the trial court, are currently under consideration by the Supreme Court. (See *People* v. *Baltazar* (S075450); *People* v. *Parker* (S077360); *People* v. *Tillman* (S077360).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.

DAU, J.*

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* Assigned by the Chairperson of the Judicial Council.

OPPOSITION BRIEF

No. 10-1115

IN THE SUPREME COURT OF THE UNITED STATES

JAVIER CAVAZOS, Acting Warden, *Petitioner*

v.

SHIRLEY REE SMITH, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When prosecution experts, coroners employed by the Los Angeles County Coroners Office, who opined that the cause of the infant's death in this case was the result of violent shaking which tore or sheared the brain and/or the brainstem, admitted at trial that they could not identify any medical evidence of tearing and/or shearing of the brain or brainstem during their autopsy of the infant, does such lack of observable medical findings meet the sufficiency of evidence standard set forth by this Court in *Jackson v. Virginia*, 443 U.S. 309 (1979).

STATEMENT OF THE CASE

Respondent adopts the recitals contained in the decisions of the Ninth Circuit Court of Appeals, which opinions are reported at 437 F.3d 884 (9th Cir. 2006), 508 F.3d 1256 (9th Cir. 2007), and 624 F.3d 1235 (9th Cir. 2010).

Rule 15.2 of the Rules of the Supreme Court of the United States states, in part:

> ...in addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted.

Petitioner's Statement of the Case, which appears at pages 3 - 14 of his Petition for Writ of Certiorari, contains material misstatements of fact and material omissions of fact, which are relevant to the question Petitioner attempts to raise before this court.

Respondent addresses these misstatements and omissions as follows, including citations to the trial record.

1. Petitioner's factual statement in his statement of the case, (hereinafter "Petitioner's Statement"), Petition, pg. 3-4:

> Respondent [Smith] explained to the social worker that, at that point, she gave Etzel "a little shake, a jostle" to awaken him. Respondent demonstrated the shaking as a smooth rather than jerking motion. But, Respondent said, Etzel still failed to respond. When the social worker asked what happened next, Respondent said, "Oh, my god. Did I do it? Did I do it? Oh, my god." At that, Respondent's daughter [Tomeka Smith] turned to her and said, "If it wasn't for you, this wouldn't have happened. Respondent did not reply.

The statements attributed to Respondent and her daughter are contradicted

by the record. Tomeka Smith testified at the trial that she was present when this conversation took place between the social worker and Respondent. Ms. Smith denied that Respondent made a statement to the effect of "Did I do it?" and denied that she, Tomeka Smith, made any statement accusing her mother, Respondent Smith, of any culpability. RT 388-391.

2. Petitioner Statement:

> [The prosecution experts] found physical evidence of recent trauma to the brain, including bleeding at the top of the brain caused by tearing of blood vessels in that area. Petition, pg. 4.

Response:

This statement is incorrect.

First, both Drs. Carpenter and Erlich agreed that when the infant's skull was opened, a small amount of blood was observed on the brain itself, approximately 1 - 2 tablespoons. RT 538, 557, 675, 758. Both doctors described the observed blood as being "small" in quantity and not the cause of the infant's death. RT 758, 676. When Erlich first observed this small amount of blood on the brain, she did not see "any physical organic injury to the brain," nor did she see any blood on the brainstem. RT 759.

3. Petitioner's Statement:

Dr. Erlich found several independent signs of recent trauma during the autopsy on Etzel's body: fresh blood, measuring one or two tablespoons, on the top of the brain; a fresh blood clot between the hemispheres of the brain; recent hemorrhaging around the optic nerves; a small quantity of fresh subarachnoid blood; and a small bruise and recent abrasion at the lower-back part of the infant's head. These indicators, together with the absence of evidence of hemorrhaging or swelling and the absence of evidence of any external injury that might have caused death, supported Dr. Erlich's conclusion that the infant was violently shaken in a way that resulted in a very rapid death. Petition, pg. 5 - 6.

Response:

This statement is both a misstatement of fact and an omission of fact.

Both Carpenter and Erlich observed a small abrasion on the back of the infant's head, which they also agreed was not the cause of death. RT 576, 711-13. This abrasion, which measured 1/16 of an inch by 3/16 of an inch, was described by Dr. Erlich by being the size of a "match head." RT 1287.

Both doctors testified that they saw small subdural hemorrhages in the outer membrane surrounding the brain, which were located in the back and bottom part

of the skull. Some of this subdural hemorrhaging was bleeding which had occurred at least two weeks prior to the infant's death. RT 570-73, 710, 718-22, 770-71.

Carpenter and Erlich also observed subarachnoid hemorrhages, hemorrhages of the middle membrane surrounding the brain. RT 570-73, 717-22. Erlich said these hemorrhages as "very, very small areas and very patchy." RT 719. She said these hemorrhages as being "about a quarter of an inch in size. . ." RT 675.

Finally, the doctors observed both old and new bleeding around the optic nerves. RT 570, 714. Erlich testified that both subdural hemorrhages and subarachnoid hemorrhages are **not** exclusively limited to cases involving Shaken Infant Syndrome, but are manifested in other forms of trauma in infants. RT 1279. Again, both doctors agreed that the subdural and subarachnoid hemorrhages and the bleeding around the optic nerves, either individually or in combination, was **not** the cause of death.

4. Petitioner's statement:

> Dr. Carpenter opined that Etzel's death had been caused by the third process [violent shaking], and he also identified the observable physical evidence supporting his opinion. He found that the bleeding

autopsy findings?

A: *One cannot know specifically.* It would be the areas that were destroyed during the shaking upon which the body - - depends for its survival such as the area in the medulla of the brainstem that controls the heart and the area in the medulla of the brainstem that controls respiration.

Q: Doctor, is it not true that the brainstem plays a critical role in the breathing of an infant?

A: Yes.

Q: And, doctor, is it not true that the reports show clearly that the brainstem was normal and intact.

A: It shows there are *no findings that could be detected.* It does not mean that it is normal and intact. It means that there *is no evidence* and *there is no evidence expected to be found* in a shaken infant that dies quickly because the body does not have time to react to the injury.

RT 694-96. (emphasis added.)

5. Petitioner's Statement:

[Dr. Carpenter] added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Petition,

pg. 7.

Response:

While both Drs. Erlich and Carpenter observed a small abrasion on the back of the infant's head, they also agreed it was not the cause of death. RT 576, 711-13. This abrasion, measured 1/16 of an inch by 3/16 of an inch, and was described by Dr. Erlich as being the size of a "match head." RT 1287.

6. Petitioner's statement:

In Dr. Erlich's opinion, Etzel's death was caused by the third process: he was shaken so violently that the vital centers of his brain were **directly damaged**, causing his heart and breathing to shut down. Petition, pg. 5. (emphasis added).

Response:

When asked to describe the cause of death of the infant, Erlich testified as follows:

Q: And they could die immediately without the swelling of the brain?

A: Yes, because that's not the mechanism. The mechanism is the *damage* to the brainstem from the shaking. It is not the swelling and it is not the amount of blood.

Q: Okay. So, doctor, you are saying that it is either the swelling of the brain

or a herniation of the brainstem? The *damage* to the brainstem?

A: It could be *damage* to the brainstem which causes *damage* to the areas that control respiration and heartbeat. And if that's the case, the death is fast.

Q: Well, so doctor - -

A: And since I don't have the blood to go on, and I don't have the swelling, the most *likely* mechanism is that it was fast and it was *direct damage* too (sp) the brainstem.

Q: But, doctor, that opinion that you have expressed now is not reflected by the findings because the brainstem is intact. There is no herniation; is that correct.

A: Yes. . . . Grossly, the brainstem is intact. But the areas - - there *may be damage* microscopically that we won't see because it all happened so fast. It is a difficult *concept* to absorb.

Q: I acknowledge that. So, doctor, it was your testimony prior and your - - I believe you stated it now that you could not microscopically tell the mechanism of death in this case, correct?

A: ***We did not even section the brainstem.*** There is no need because it happened so fast that ***we wouldn't even see anything.***

RT 1298-99. (Emphasis added).

Throughout Petitioner's Statement of the Case related to the state court trial, he appears to rely upon the trial transcript by including quoted passages, but since he omits any citation to the trial record it is difficult to respond to some of these quoted passages.

7. Petitioner's statement regarding the direct review of Respondent's state court conviction. With respect to Respondent's insufficiency claim on direct appeal, Petitioner states "the state court presented a lengthy and meticulously detailed summary of the trial evidence, with special emphasis on the testimony of the expert witnesses for both sides." Petition, pg. 9.

Response:

The opinion of the California Court of Appeal in this matter is significant for what it failed to include in its opinion.

In reporting these findings, the court **failed** to disclose that the blood on the infant's brain was insignificant in quantity, approximately 1 - 2 tablespoons, and was not the cause of the infant's death. With respect to the abrasion on the back of the infant's head, the court **failed** to describe this abrasion as being 1/16 by 3/16 of an inch in size. With respect to the subdural and subarachnoid hemorrhages the court failed to describe that these hemorrhages were approximately 1/4 of an inch

in size, which Carpenter said were "small, mild areas" of hemorrhage.

The court recounted Dr. Carpenter's testimony that in his opinion the infant died as "a result of direct trauma to the vital areas of the brain before there was enough accumulation of blood to cause death from pressure on the brain." Petitioner's App. K, pg. 82.

The court then addressed the testimony of Dr. Erlich, who corroborated Dr. Carpenter's testimony about the autopsy findings of the infant. The court also included Dr. Erlich's testimony concerning the neuropathological examination which she conducted on the infant's brain, along with Dr. Hidelo Itabashi, and Dr. Erlich's testimony concerning the presence of subarachnoid and subdural hemorrhages. The court reported Dr. Erlich's testimony that in her opinion the cause of death was trauma to the brain. Petitioner's App. K, pg. 84.

The significance of the court's opinion concerning the testimony of the prosecution's medical experts was not that which was included in the opinion, but rather the more significant testimony from Carpenter and Erlich which was **not** mentioned in the opinion at all. The court **failed** to mention that Carpenter and Erlich agreed that two of the recognized causes of death in Shaken Infant Syndrome cases are massive swelling of the brain or massive bleeding within the infant's skull, which both cause the brain to be pushed downward within the skull

REASONS FOR DENYING THE WRIT

I. This Court Should Deny Respondent's Petition for Writ of Certiorari Because His Assertions for Granting the Writ Are Neither Factually Nor Legally Accurate.

For the third time in the past five years, Respondent (actually the State of California) seeks to reincarcerate an elderly, African-American grandmother, who has already served some ten years in custody as a result of a state court conviction which is not supported by sufficient evidence.

For the third time, Petitioner mischaracterizes this case as one in which the Ninth Circuit Court of Appeals re-weighed conflicting expert testimony concerning the cause of the infant's death and substituted its view that the defense experts were more persuasive than the prosecution's experts. *See* Petition, pg. 21 - 23. Petitioner's mischaracterization of the Ninth Circuit's decision is an obvious attempt to garner this Court's attention to the case. The Ninth Circuit did not choose the defense experts' testimony over that of the prosecution, but rather found that the scientific evidence agreed upon by all five medical experts in the case did not support the prosecution experts' opinion that the infant died as a result of Shaken Baby Syndrome. The Ninth Circuit relied upon the admissions of the prosecution's experts that they were unable to identify through the gross autopsy, the neuropathological examination and/or the eye pathology **any** medical

evidence to support their hypothesis concerning the cause of death. The court found that the absence of any medical evidence of the supposed tearing or shearing of the brain and/or the brainstem, constituted an **absence** of evidence which was insufficient to constitute proof of guilt beyond a reasonable doubt in this case. This conclusion by the court was not its choice of the testimony of one set of experts over the other, but rather its finding that there was **no** medical or circumstantial evidence to support the hypothesis offered by the prosecution's experts.

A federal court's collateral review of a state court conviction does not involve a determination of whether the evidence established guilt beyond a reasonable doubt. *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992), cert. denied, 510 U.S. 843, 114 S.Ct. 131 (1993). Instead, the federal court determines only whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* If no rational trier of fact could have found proof beyond a reasonable doubt, then the writ is granted. *Jackson*, 443 U.S. at 324; *Wright v. West*, 505 U.S. 277, 318-319 (1995).

The very existence of the reasonable doubt test set forth in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979), presupposes that juries, accurately

charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt should never be found except on a rationally supportable state of near certitude." *West v. Wright*, 931 F.2d 262, 268 (4th Cir. 1991), rev'd on other grounds, 505 U.S. 277, 112 S.Ct. 2482 (1992)(quoting *Jackson v. Virginia*, 443 U.S. at 315, 99 S.Ct. at 2786).

The Ninth Circuit was faced with uncontroverted evidence in many areas, including Smith's personal history, the circumstances surrounding the death of the infant and the medical findings of the gross autopsy, the neuropathological exam and the eye pathology.

First, Smith had no history of violence, no history of any social problems, no history of child abuse upon her children or her grandchildren, no history of infliction of corporal punishment upon her children and/or her grandchildren and no evidence of any predisposition to commit the violent act attributed to her.

In addition, the infant, Etzel Smith, had no history of any abuse and presented at the hospital with no observable signs of any physical abuse inflicted upon him. The infant had acted normally the evening he died, going to sleep on

his stomach in the living room area of the apartment, with his mother asleep a few feet away in an adjoining bedroom. Smith found the infant to be unresponsive and limp at approximately 3:20 a.m. on November 30, 1997. Emergency personnel were summoned, but the infant could not be revived. The diagnosis by the emergency room doctor was that the infant died as a result of Sudden Infant Death Syndrome.

More importantly, all five medical experts who testified in this case agreed upon the medical findings of the gross autopsy, the neuropathological examination of the brain and the pathological examination of the infant's eyes. Upon gross autopsy, a small amount of fresh blood, approximately 1 - 2 tablespoons, was found on top of the infant's brain. A small abrasion, approximately 1/16 of an inch by 3/16 of an inch, was located on the back lower part of the infant's head. There were findings of recent subdural and subarachnoid hemorrhages, as well as evidence of old subdural bleeding, and both old and new bleeding around the optic nerves. The experts agreed that the old bleeding observed within the infant's skull had occurred at least days, if not weeks, prior to his death.

Except for the minor bleeding, there were no other findings indicating any trauma to the infant, either internally or externally. There were no fractures of any of the infant's bones, there was no bruising observed on the infant's body, there

were no sprains or dislocations of any of the infant's joints, there was no swelling of the infant's brain and no significant bleeding within the infant's skull.

All of the medical experts agreed that the two medically recognized causes of death in Shaken Baby Syndrome cases are massive bleeding and massive swelling within the skull, both causing downward pressure of the brain into the spinal column which crushes the brainstem. All medical experts in this case agreed that there was no swelling of the infant's brain which was the cause of death and that the bleeding which was observed inside the infant's skull was insignificant and did not cause the infant's death. The experts all agreed that the small abrasion on the back of the infant's head was not the cause of the infant's death.

The experts all agreed that in at least 80 - 85 percent of cases involving Shaken Baby Syndrome, there is observable retinal hemorrhaging. There was no retinal hemorrhaging in this case.

Most importantly, all of the medical experts agreed that the gross autopsy and subsequent neuropathological examination of the brain did not reveal any **observable** damage to the brain or the brainstem. Both the brain and the brainstem were normal and intact.

Despite the agreement by all five medical experts about the medical findings

detailed above, the prosecution's experts offered their hypothesis that Smith's assumed shaking of the infant had torn or sheared the brain and/or brainstem of the infant causing his nearly instantaneous death. The prosecution experts, both coroners working for the Los Angeles County Coroner's Office, admitted that this shearing or tearing of the brain and/or brainstem **could not** be detected upon their physical examination of the infant. They agreed that there was **no observable evidence** in the brain and/or the brainstem confirming their supposition as to the cause of death.

Moreover, the prosecution experts did not they testify that they were offering their medical opinions based upon "a reasonable degree of medical certainty" that the child was a victim of Shaken Baby Syndrome. *See People v. Ewing*, 72 Cal. App. 3d, 714, 140 Cal.Rptr. 299 (1977). In addition, neither coroner testified that they had previously performed an autopsy upon an infant in which they reached a similar hypothesis, that being an infant who died instantly with no observable brain injury. Neither coroner testified that their hypothesis of instantaneous death, without any observable damage to the brain or brain stem, was supported by any recognized medical literature.

This case has nothing to do with the Ninth Circuit choosing one set of experts over the other set of experts, but rather the court's correct conclusion that

the hypothesis offered by the prosecution experts had no evidentiary support from the agreed upon medical findings of the gross autopsy, the neuropathological examination of the brain and the eye pathology of the infant's eyes. The Ninth Circuit was correct in concluding that a defendant cannot be found guilty beyond a reasonable doubt and sentenced to life in prison based upon an **absence of evidence** to support the hypothesis of the state's experts.

II. The Ninth Circuit Correctly Analyzed this Court's Decision in *McDaniel v. Brown*, 558 U.S. _____, 130 S.Ct. 665 (2010), as it Applied to this Case.

On or about Jan 19, 2010, the United States Supreme Court vacated this court's prior judgment in this matter and remanded the case for further consideration in light of *McDaniel v. Brown, 558* U.S. _____ , 130 S.Ct. 665 (2010).

A. This Court's Decision in *McDaniel v. Brown*.

In a *per curiam* decision, the Supreme Court held, in *McDaniel v. Brown*, that the Ninth Circuit erred when it granted habeas corpus relief to a state prisoner by misapplying *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A Nevada jury convicted Brown of sexual assault, relying primarily upon DNA evidence recovered from the victim's underwear which matched Brown's

DNA profile.

Brown sought state post-conviction relief, claiming that his trial counsel was constitutionally ineffective for failing to object to the admission of the DNA evidence and this failure caused valid issues for appeal not to be preserved. The state post-conviction relief was denied by the Nevada appellate courts and the Nevada Supreme Court.

Brown thereafter filed a federal habeas petition claiming there was insufficient evidence to convict him of the assault charges and that the Nevada Supreme Court's rejection of his claim was both contrary to, and an unreasonable application of *Jackson*. This claim was not a typical sufficiency claim under *Jackson*, but rather an argument that the DNA evidence admitted against him should have been excluded from the *Jackson* analysis on the grounds that it was inaccurate and unreliable. In support of his claim, Brown submitted a report prepared by Dr. Lawrence Mueller (the Mueller Report), which had been prepared some 11 years after the trial. The district court supplemented the appellate record with the Mueller report even though it had not been presented to the state court jury. Relying upon the Mueller Report, the district court set aside the "unreliable DNA testimony" and held that, without the DNA evidence, a reasonable doubt would exist in the mind of any rational trier of fact concerning the prisoner's guilt.

The court granted habeas release on the *Jackson* claim.

The Ninth Circuit, in *Brown v. Farwell*, 525 F.3d 787 (9th Cir. 2008), affirmed the district court decision, holding that "the admission of [the state's DNA expert's] unreliable and misleading testimony violated Troy's due process rights . . . *Id.* at 797. The court then reviewed the sufficiency of the remaining evidence, including the district court's "catalog [of] the numerous inconsistencies that would raise a reasonable doubt as to [the prisoner's] guilt in the mind of any rational juror." *Ibid.* In light of the "stark" conflicts in the evidence and the state's concession that there was insufficient evidence absent the DNA evidence, the court held that it was objectively unreasonable for the Nevada Supreme Court to reject Brown's sufficiency of the evidence claim. *Id.* at 798.

This court granted certiorari to consider the proper standard of review for a *Jackson* claim on federal habeas and whether such a claim may rely upon evidence outside the record that goes to the reliability of the trial evidence.

In briefing before this court, both parties agreed that the resolution of the *Jackson* claim by the Ninth Circuit was in error. The court found, however, that the *Jackson* issue was not moot since the parties continued to seek different relief from the court. Brown conceded that it was improper for the district court to admit the Mueller report for the purpose of evaluating his *Jackson* claim and

conceded the "purpose of the *Jackson* analysis is to determine whether the jury acted in an irrational manner in returning a guilty verdict based upon the evidence before it, not whether improper evidence violated due process . . ." Brief for Respondent 35, at 2. Finding that there had been no suggestion that the evidence adduced at trial was insufficient to convict unless some of the DNA evidence was excluded, this court found that Brown's concession disposed of his *Jackson* claim.

Having disposed of the sufficiency claim related to the DNA evidence, the court went on to find that the holding of the Ninth Circuit related to the non-DNA evidence departed from the differential standard of review required by *Jackson* and 28 U.S.C. §2254 (d)(1).

In its decision affirming the decision by the district court to grant habeas relief, the Ninth Circuit reviewed "numerous inconsistencies that would raise a reasonable doubt as to [Brown's] guilt in the mind of any rational juror." 525 F.3d at 797. These inconsistencies included the following: (1) three witnesses disagreed about the time when Brown left the bar to return home the night of the assault, with one witness placing him at the bar after the assault had occurred, (2) the victim identified Brown as her attacker, but had twice identified Brown's brother, Trent, as her assailant, (3) there was considerable conflict between the victim's description of her attacker and Brown's clothing and appearance the night

of the assault, (4) the defense offered testimony by Brown's brother and his roommate that they did not see blood on Brown's boots or notice anything unusual when he arrived home at approximately 1:30 a.m., the night of the assault, (5) an investigating officer failed to find any marks on Brown's hands or blood on his clothing, which would have been consistent with Brown being the assailant, (6) there was inconsistency in testimony about Brown's reason for washing his clothes when he arrived home the night of the assault, (7) there were questions about the manner in which the forensic evidence at the scene was collected and examined by investigating officers, (8) the fact that Brown's fingerprints did not match the fingerprint on the night stand in the victim's room, which the victim testified her attacker had turned off before waking her, (9) the fact that the victim's bedding and pubic hairs discovered in the victim's bedroom were not tested for DNA samples, and (10) the fact that Brown voluntarily contacted the police to determine whether he was wanted for arrest and the fact that he voluntarily submitted to a full-body examination. *Id.* at 797.

The Ninth Circuit concluded this exhaustive examination of the differences between the prosecution evidence and the defense evidence by stating:

> The conflicts in the evidence are simply too stark for any rational trier of fact to believe that [Brown] was the

> assailant beyond a reasonable doubt, an essential element of any sexual assault charge. This conclusion is confirmed by respondent's own concessions. Therefore the Nevada Supreme Court's decision was "an unreasonable application of" *Jackson*. *Id.*

The U.S. Supreme Court, in *McDaniel*, concluded its *Jackson* analysis by stating:

> In sum, the Court of Appeals analysis failed to preserve "the fact finder's role as weigher of the evidence" by reviewing "all the evidence . . . in the light most favorable to the prosecution," (internal cite omitted) and it further erred in finding that Nevada Supreme Court's resolution of the *Jackson* claim was objectionally unreasonable.

558 U.S. at _____.

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B. **The Distinction Between *McDaniel v. Brown* and The Ninth Circuit's Decision in *Smith v. Mitchell*.**[1]

The Ninth Circuit's decision in *Smith v. Mitchell* stands in stark contrast to the Supreme Court decision in *McDaniel v. Brown*. In *Smith*, the Ninth Circuit, as is required by *Jackson*, set forth a summary of the evidence submitted to the jury at trial. 437 F.3d at 885-888. Having summarized the trial evidence, the Ninth Circuit then proceeded to its sufficiency analysis. Ninth Circuit correctly observed that while the prosecution experts testified that shaking had caused the victim's death, the experts conceded the absence of the usual indicators of violent shaking, such as bruises on the body, fractured arms or ribs, or retinal bleeding. *Id.* at 890. The Ninth Circuit also observed that while there was bleeding on the brain, both old and new, the prosecution experts agreed that the bleeding did not cause death. *Id.* at 890. The Ninth Circuit further observed that while the prosecution experts opined that violent shaking had torn or sheared the brainstem, they admitted the supposed trauma was undetectable. *Id.* at 890. The prosecution experts agreed that the brain of the victim did not exhibit the usual manner of death in Shaken

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[1] The original opinion of the Ninth Circuit reversing the judgment of the district court and remanding with instructions to grant respondent's petition for writ of habeas corpus is reported at 437 F.3d 884 (9th Cir. 2006), and the order denying the warden's petition for rehearing and suggestion for rehearing en banc is reported at 453 F.3d 1203 (9th Cir. 2006).

Baby Syndrome cases, that being excessive bleeding or swelling that crushes the brainstem. *Id.* at 890. The Ninth Circuit then stated that "Instead, their testimony was that death was caused by shearing or tearing of the brainstem and they reached this conclusion because *there was no evidence in the brain itself of the cause of death.*" *Id.* at 890. (emphasis added).

The Ninth Circuit went on to state:

> The prosecution's expert testimony, absolutely crucial to its case, concluded that the cause of death was tearing or shearing of the brainstem when there was no physical evidence of tearing or shearing, and no other evidence supporting death by violent shaking. *Absence of evidence cannot constitute proof beyond reasonable doubt.* (emphasis added).

Id. at 890.

In deciding *Smith*, the Ninth Circuit did not, as Respondent continues to argue, substitute the opinion of defense experts concerning the cause of death of the victim for the testimony of the prosecution experts. The Ninth Circuit simply pointed to the fact that the prosecution experts, whose testimony was the sole basis of the jury's guilty verdict, did not offer identifiable evidence that the victim's brain had suffered any trauma whatsoever. The prosecution's experts simply

opined that the victim's brain must have suffered trauma which caused death, all the while agreeing that there was no physical evidence of such trauma.

In contrast, in *McDaniel v. Brown*, this court pointed to numerous instances in which the Ninth Circuit compared and contrasted prosecution evidence with defense evidence. The Ninth Circuit had referred to no fewer than ten instances of contradictory evidence between the prosecution case and the defense case in reaching its decision.

The Ninth Circuit did not engage in such a comparative analysis of the evidence in *Smith*, but rather correctly pointed out that the prosecution case against Smith was not simply insufficient, but nonexistent. The prosecution experts' opinions were not supported by any observable physical evidence of trauma to the victim. The Ninth Circuit did not compare and contrast the prosecution experts with the defense experts. Rather, the Court ruled that there was a failure by prosecution experts to identify and present verifiable physical evidence to support their opinions concerning the case of the victim's death. This failure of evidence compelled the Ninth Circuit's decision.

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III. This Court Should Deny the State's Petition for Writ of Certiorari Because this Court Is Not the Appropriate Forum for Resolving Factual Disputes.

By its own decree, this Court is not the appropriate forum for addressing a claim of erroneous factual findings by a lower court: "[W]e do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925); *see NLRB v. Henricks County Rural Elec. Memership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition; petition presented primarily a question of fact, "which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962) (per curaim); *Southern Power Co. V. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. V. Goodrich*, 245 U.S. 440 (1918); Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the arrested error consists of erroneous factual findings").

Indeed, this Court is understandably loathe to review issues of fact. Instead, a Petition for Rehearing and Suggestion for Rehearing en Banc following an adverse decision from the court of appeals is the appropriate vehicle for considering facts "overlooked or misapprehended . . ." Fed. R. App. P. 40(a)(2). The State filed such a pleading in this case, and failed to receive a single vote from any of the judges of the lower court. This Court need not become a third court of involvement. *Graver Tank & Mfg. Co v. Linde Air Products*, 336 U.S. 271, 275

(1949).

As Petitioner has pointed out above, the State, for the third time, argues that the Ninth Circuit adopted the expert opinions of defense witnesses over the expert opinions advanced by prosecution witnesses. The Ninth Circuit has explained, in three separate opinions, that this is not and has not been the case. However, even if this case involved a claim of erroneous factual findings by a lower court, this Court is not the appropriate forum for resolving such factual disputes.

IV. The Myth of Infallible Forensic Evidence.

Over the past three decades, a belief has taken hold in the criminal justice system that critical elements of many cases can be conclusively and irrefutably resolved through the use of forensic evidence. This belief stems from the assumption that state forensic examiners are highly-trained scientists, who conduct widely-recognized tests and can then provide an objective and impeachable report about their results for use in criminal trials. In reality, state forensic examiners do exercise substantial discretion and judgment, regardless of the nature of the technique, and these examiners often interpret the results of unverified techniques for which there often exists no recognized or objective standard at all.

Undoubtedly, there are many cases in which qualified forensic examiners

are careful and conservative in their work, exercise appropriate professional discretion and judgment, and thus provide sound and helpful scientific opinions. Unfortunately, however, there are also hundreds of documented cases in which state forensic examiners have relied upon unscientific methods and procedures, have made mistakes in recording or reporting results, have evinced bias in favor of the prosecution by overstating the probative value of test results, and have even fabricated test results entirely. In short, there are simply no basis for the idea that, as a result of the "scientific" label placed upon the opinion of a state examiner, forensic testimony is somehow "neutral" or ministerial and therefore unimpeachable.

While this court is obviously concerned about the involvement of the federal appellate courts in sufficiency of evidence reviews of state court convictions, the court did recently address the issue of testimony related to "neutral scientific testing." In *Melendez-Diaz v. Massachusett*, 129 S.Ct. 2527, 174 L.Ed.2d 1314 (2009), a state appellate court ruled that the trial court had comported with the Sixth Amendment when it admitted certificates of analysis sworn by a state crime lab analyst without requiring in-court testimony by the analyst. The court, finding that the admission of the certificates violated petitioner's Sixth Amendment right to confront witnesses, addressed the issue of

whether "neutral, scientific testing" should have to withstand confrontation by coss-examination.

The court stated:

> Nor is it evident that what respondent called "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspicies of the National Academy of Sciences, "the majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency, (internal cite omitted) and because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." (internal cite omitted).

129 S.Ct. at 2536.

In a recent study, which examined the cases of 232 defendants who had been exonerated by post-conviction DNA testing, 156 exonerees were identified as having had forensic testimony at their trial. The study examined trial transcripts in 137 of the 156 cases. The study found invalid forensic science testimony had been admitted in 82 cases - - sixty percent of the 137 cases in the study set. *See, Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia Law Review 1, March 2009, at pg. 5.

This invalid forensic testimony involved serological analysis (100 cases), microscopic hair comparison (65), fingerprint comparison (13), DNA analysis (11), forensic geology (soil comparison)(6), forensic odontology (bite mark comparison)(6), shoe print comparison (4), fiber comparison (2), voice comparison (1), and fingernail comparison (1). *Id* at pg. 5. Most of the invalid forensic testimony involved evidence which was presented as inculpatory. In just two of the 82 cases with invalid forensic testimony, the analyst testified that all of the forensic evidence was non-probative or inconclusive. *Id* at pg. 6.[2]

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[2] *See also, Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (March 2009), *Why a Conviction Should Not Be Based on a Single Piece of Evidence: A Proposal for Reform*, 48 Jurimetrics J. 43 (Fall 2007), *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. and Criminology 761 (Spring 2007), Symposium: *Wrongful Convictions: Causes and Cures, ABA Policies Concerning Wrongful Convictions*, 37 Sw. L. Rev. 832 (2008), *Post-*

Criminal cases involving alleged fatalities as a result of Shaken Baby Syndrome are particularly dependant upon forensic evidence. In a prosecution paradigm without precedent, expert medical testimony is used to establish that a crime occurred, that the defendant caused the infant's death by shaking, and that the shaking was sufficiently forceful to constitute depraved indifference to human life. Shaken Baby Syndrome (SBS) is, in essence, a medical diagnosis of murder, one usually based solely on the presence of a diagnostic triad: retinal bleeding, bleeding in the protective layer of the brain, and brain swelling. However, new scientific research has cast doubt on the forensic significance of this triad, thereby undermining the foundations of thousands of SBS convictions. *See, The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts*, 87 Wash. U.L. Rev.1 (2009).[3]

Professor Deborah Tuerkheimer, the author of "*The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts*," stated:

> The application of the evidence-based framework to the SBS literature resulted in a remarkable determination: the

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Conviction Claims of Innocence, 24 Fall Crim. Just. 14 (Fall 2009).

[3] *See also, Criminal Justice at a Crossroad: Science-Dependant Prosecution and the Problem of Epistemic Contigency*, 62 Alabama L. Rev. _____ (forthcoming 2010) (draft, March 2010).

medical literature published prior to 1998 contained "inadequate scientific evidence to come to a firm conclusion on most aspects of causation, diagnosis, treatment, or any other matter pertaining to SBS." (internal cite omitted). More specifically, "serious data gaps, flaws of logic, and inconsistency of case definition" meant that "the commonly held opinion that the finding of [subdural hematoma] and [retinal hemorrhage] in an infant was strong evidence that SBS was unsustainable." (internal cite omitted) *Id.* at 12.

Professor Tuerkheimer further stated:

> New debate has emerged regarding whether shaking can generate the force levels sufficient to cause the injuries associated with SBS. Those who believe it point to a number of biomechanical studies, as well as research using animal and computer models. (internal cite omitted) Many of these scientists assume arguendo that rotational acceleration-deceleration forces can, in theory case retinal hemorrhage and subdural hematoma, but

> contend that shaking an infant with sufficient force to do so would necessarily damage the neck and cervical spinal cord or column. Since most infants diagnosed with SBS do not present this type of injury, (citing Kimberley Molina, *Neck Injuries in Shaken Baby Syndrome*, 30 AM. J. Forensic Med. & Pathology 89 (2009)), they could not have been simply shaken. (citing Faris A. Bandak, *Shaken Baby Syndrome: A Biomechanics Analysis of Injury Mechanisms*, 151 Forensic Sci. Int'l. 71 (2005).) *Id.* at 20-21.

The Tuerkheimer article, *The Next Innocence Project*, focuses on scientific developments which have cast doubt upon the guilt of defendants who have been convicted based upon triad-only SBS diagnosis, the triad consisting of retinal bleeding, bleeding in the protective layer of the brain and brain swelling.

While substantial scientific questions have been raised concerning these triad-only SBS cases, it is important to recall that the Ninth Circuit specifically noted the absence of all three triad symptoms in the victim in the *Smith* case. The prosecution experts in *Smith* admitted there was no retinal bleeding, no substantial bleeding and no substantial swelling, those most commonly recognized and now

challenged symptoms of SBS. In this case, jurors were faced with the only evidence which implicated Smith, the opinions of the coroners employed by the state. These opinions were unsupported by any scientific testing results and unsupported by any recognized medical findings at autopsy.

While these studies, calling into question the criminal justice system's dependence upon questionable scientific forensic evidence in some cases, are not part of the record before the court with regard to the sufficiency issue in this case, the information contained in these numerous studies should cause anyone to pause before affirming a life sentence based soley upon a coroner's opinion, which opinion was unsupported by any physical forensic findings concerning the cause of the victim's death.

CONCLUSION

The death of an infant, such as Etzel Smith, is an unnatural tragedy and, in the face of such a tragedy, there is a societal need to assign blame, to hold someone responsible. However, much as the death of an infant child demands an explanation, society must also be concerned about due process and the constitutional mandate that all persons be presumed innocent until proven guilty. The Ninth Circuit Court of Appeals was correct when it found that the hypothesis advanced by Los Angeles County Coroners Erlich and Carpenter, that the baby

died as a result of violent shaking which tore or sheared the brain and/or the brainstem, failed to meet the mandate of proof beyond a reasonable doubt since the same experts admitted that there was no medical evidence of any tearing or shearing of the brain or the brainstem in this case. The coroners' hypothesis of "instant death/no observable brain injury" was constitutionally insufficient to support the jury's finding of guilt. The petition must be denied.

Dated: 4/7/2011

Michael J. Brennan, Attorney for
Shirley Ree Smith, Respondent

STATEMENT OF BRIEF FORMAT

Pursuant to Ninth Circuit Rule 32(e)(3), Counsel certifies that the opening brief is proportionally spaced, has a typeface equivalent to 14 points or more (Times New Roman)(Corel WordPerfect 12 for Windows 14 point) and contains fewer than 7,520 words.

Dated: April 7, 2011

Michael J. Brennan

REPLY BRIEF

RECORD
AND
BRIEFS

No. 10-1115

SUPREME COURT, U.S.
FILED
APR 26 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

JAVIER CAVAZOS, ACTING WARDEN, *Petitioner*,

v.

SHIRLEY REE SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Question Presented is whether the Ninth Circuit on remand from this Court for reconsideration in light of *McDaniel* v. *Brown*, 130 S. Ct. 665 (2010), failed for the third time to apply the deferential standard for habeas corpus review under 28 U.S.C. § 2254(d) when it granted relief on an insufficient-evidence claim regarding cause of death by accepting the expert testimony of defense experts over the contrary opinions of prosecution experts believed by the jury and found sufficient by the state appellate court. Constitutional sufficiency review is conducted under the deferential "any rational factfinder" standard defined in *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). State adjudications of sufficiency claims are also insulated by the additional layer of protection afforded by AEDPA, which precludes federal habeas relief unless the state judgment was an objectively unreasonable application of clearly established Supreme Court law. *Brown*, 130 S. Ct. at 674.

In the first decision in this case, the Ninth Circuit panel lost sight of both layers of deference. The state appellate court, after a careful review of the record, had rejected the claim of insufficient evidence of cause of death based on its conclusion that this was a case involving a conflict of expert opinion evidence that was for the jury to resolve. The Ninth Circuit reweighed the evidence and chose to credit the defense experts who were disbelieved by the jury, thus disregarding the deference demanded by *Jackson*. The Ninth Circuit then exacerbated its error by concluding that the state appellate court's finding of substantial evidence to support the jury's verdict was an objectively unreasonable application of *Jackson* because this was a case of *no* evidence of cause of death rather than a case of conflict of the

evidence. This conclusion was possible only by misapprehending the record and ignoring the additional layer of protection for state judgments mandated by AEDPA. When this Court granted the Warden's first petition for certiorari and remanded the case, it offered the Ninth Circuit an opportunity to reevaluate its decision in light of *Carey* v. *Musladin*, 127 S. Ct. 649, 654 (2006). In response, the Ninth Circuit simply held that *Musladin* had nothing to do with this case, and reinstated its first opinion unchanged.

The latest decision in this case comes after this Court granted the Warden's second petition for certiorari, and vacated and remanded under an intervening decision, *McDaniel* v. *Brown*, 130 S. Ct. 665, where this Court held that a federal court on habeas may not overturn a state conviction for insufficient evidence by discounting prosecution expert testimony in favor of defense expert testimony. Despite *Brown*'s logical application to this case, the Ninth Circuit has again found the authority that this Court remanded under to be irrelevant, and has again reinstated its original opinion unchanged. Consequently, as in *Brown*, the Ninth Circuit has again "made an egregious error" by finding, even with the additional deference afforded by 28 U.S.C. § 2254(d), that the evidence was constitutionally insufficient to support the conviction on the ground that the defense expert testimony trumped the prosecution expert testimony. *Id.* at 673-74.

I. THE NINTH CIRCUIT IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT IN PLACE OF THE JURY'S JUDGMENT IN REJECTING EXPERT OPINION REASONABLY SUPPORTED BY SUBSTANTIAL EVIDENCE AT TRIAL

1. In her brief in opposition to the third petition for certiorari, Smith repeats her argument that this is not a case involving a conflict of expert opinion at all, and that the Ninth Circuit did not simply substitute its preference for the defense expert opinion on cause of death for the jury's decision crediting the prosecution experts. Smith contends that this is a case in which there was *no* evidence to support the opinion of the three prosecution experts that the cause of death was violent shaking. More specifically, Smith asserts that the prosecution experts were unable to identify "*any* medical evidence to support their hypothesis concerning the cause of death," and even contends, incorrectly, that the prosecution experts *agreed* that there was no physical evidence to support their opinions. Opp. 13-14, 18. Most importantly, Smith argues that the three prosecution experts agreed with the two defense experts that there are only two "medically recognized causes of death in Shaken Baby Syndrome cases," namely "massive bleeding and massive swelling within the skull, both causing downward pressure of the brain into the spinal column which crushes the brainstem." Opp. 17. All of these assertions by Smith are completely belied by the record in this case.

2. All three prosecution expert witnesses testified that Etzel Glass's death was caused by violent shaking. Both Dr. Ehrlich, who conducted the autopsy, and Dr. Carpenter, the autopsy supervisor, testified that death from violent shaking can occur in *three* different ways, not two, as Smith asserts. First,

the shaking can cause a massive subdural hemorrhage so that the bleeding will eventually build up enough pressure to damage the brain stem. Second, the shaking can cause massive swelling of the brain, which can result in compression of the brain stem. And, third, the shaking can be violent enough to cause direct trauma to the vital centers of the brain which control the functioning of the heart and breathing, leading to a very rapid death. The prosecution experts all found that the infant died as a result of the third process. RT 692-96, 801, 1273-98, 1476-80.

Two defense experts disagreed with the prosecution expert opinions on the ground that the autopsy did not find the massive swelling or bleeding in the brain characteristic of the first two processes, and offered the opinion that the Shaken Baby Syndrome diagnosis was ruled out by the absence of observable brain stem shearing.

Dr. Carpenter and Dr. Erlich, in turn, disputed the defense theory and testified that the presence of visible brain stem damage was *not essential* to the diagnosis of death by violent shaking. Even more importantly, however, all of the prosecution experts explained *why* the swelling and bleeding and visible brain stem shearing did not develop in this case: the shaking was so violent that it caused virtually instantaneous death, thus cutting off the infant's circulation. RT 552-53, 576-77, 730-31, 1296-98, 1324. Judge Bea accurately pointed out that the conflict between the experts centered on the dispute over the question of whether "to be valid, does a doctor's opinion that a baby died from violent shaking require evidence, visible on autopsy, of brain stem shearing?" *Smith* v. *Mitchell*, 453 F.3d 1203, 1206 (9th Cir. 2006) (Bea, J., dissenting). The prosecution experts said no. The defense experts

said yes. This is a conflict of evidence requiring resolution by a trier of fact. It is not an absence of evidence.

The prosecution experts did not merely present a "hypothesis" concerning the cause of death, however. They pointed to substantial physical evidence supporting their opinion that the death was caused by violent shaking. During the autopsy, Dr. Erlich noted one or two tablespoons of fresh blood on the top of the infant's brain, a fresh blood clot between the hemispheres of his brain, recent hemorrhaging around his optic nerves, a small quantity of fresh subarachnoid blood, and a small bruise and recent abrasion at the lower back part of his head. In combination with the absence of any evidence of hemorrhaging or swelling and the absence of any external injury that might have caused death, these indicators supported Dr. Erlich's conclusion that Etzell Glass was shaken so violently that he died very quickly. RT 538-42, 710-729.

Dr. Carpenter also found that the evidence of recent injury to the brain substantiated his opinion that violent shaking was the cause of death. He found that the bleeding at the top of the brain was caused by tearing of the blood vessels in that area. RT 604. He also noted that there was no evidence of any external trauma that could alone have caused this tearing. In the absence of such evidence, and in conjunction with the other evidence of internal injury to the brain, Dr. Carpenter found that the bleeding on top of the infant's brain was caused by violent shaking, resembling "a whiplash action of the head on top of the body with the back of the head slamming into the back and the front of the chin slamming into the chest repeatedly so that the vessels on top of the brain tore." RT 540.

In addition, Dr. Carpenter explained that the subdural blood, the subarachnoid blood, and the blood around the optic nerves together showed "violent trauma to the head sufficient to cause the death of the infant." He added that the bruise and abrasion at the back of Etzel's head had "very probably" occurred during the shaking, indicating that the head collided with a hard, rough surface. Based on these observable findings, Dr. Carpenter testified that shaking caused Etzel's death and that the shaking was "so violent that it destroy[ed] the vital centers in the brain" and led to "a quick death." RT 604-12.

The prosecution experts also explained that this rapid death resulted in trauma to the brain stem that *could not* be seen because the child's circulation had been shut down. All three prosecution experts testified that some of the effects of the trauma often seen in cases of Shaken Baby Syndrome simply did not have time to develop in this case. In Judge Bea's succinct summary, "the prosecution's experts based their opinions on the evidence of recent trauma to Etzel's brain, and explained how a rapid death would result in brain-stem tearing that could not be seen. When the defense's experts disputed the validity of this hypothesis, it was for the jury to resolve the conflicting opinions." *Smith*, 453 F.3d at 1208.

In short, the state appellate court correctly concluded that this was a case involving a straightforward conflict of expert opinion testimony. There is simply no basis for the view that there was *no* evidence of trauma to support the testimony of the prosecution witnesses. The prosecution experts "reached their conclusion [on cause of death] despite the lack of visible shearing, not because of it, and explained why." *Smith*, 453 F.3d at 1206.

Smith's argument that this was not a case of conflicting expert opinion as to the cause of death, but rather a case in which the prosecution experts offered *no* objective physical evidence to support their opinion that the cause of death was Shaken Baby Syndrome, thus finds no support in the record. And Smith's assertion that the prosecution experts agreed with the defense experts that death from violent shaking can only occur in two ways, not three, is simply wrong. When the jury chose to believe the prosecution experts, it acted on the basis of substantial evidence.

In addition to the expert testimony, moreover, the prosecution relied on other significant inculpatory evidence. As the magistrate judge correctly noted, Smith made several statements that reasonably could be taken as admissions of guilt. Smith was alone with Etzel at the time of his death. She admitted that when she picked him up, his head "flopped back." She also admitted that she shook or "jostled" or "twisted" him when he appeared to be unconscious. In response to questions from a social worker, Smith said, "Oh, my God. Did I do it? Did I do it? Oh, my God." When Smith's daughter told her, "If it wasn't for you, this wouldn't have happened," Smith did not reply. This too was evidence of guilt supporting the verdict.

3. The California appellate court properly rejected Smith's claim of constitutionally insufficient cause-of-death evidence, finding that the jury resolved the conflict between the experts on the basis of substantial evidence from the prosecution experts, as well as the additional inculpatory circumstantial evidence of respondent Smith's guilt. When the Ninth Circuit disagreed and granted habeas relief, finding the defense theory more plausible because the death did not occur in the "usual manner" of

Shaken Baby Syndrome deaths, the panel "stepped over the line dividing the province of the jury from that of the court," as Judge Bea aptly put it. *Smith*, 453 F.3d at 1206. In this manner, the Ninth Circuit panel failed to apply the deferential *Jackson* rule for reviewing the claim of insufficiency of evidence.

II. THE NINTH CIRCUIT FAILED TO HONOR—AND THE OPPOSITION BRIEF WHOLLY FAILS TO DISCUSS—THE DEFERENTIAL-REVIEW RESTRICTIONS IMPOSED ON THE FEDERAL COURTS BY AEDPA

1. In addition to its misapplication of the *Jackson* standard, the Ninth Circuit failed to review the state court denial of the claim of insufficient evidence of cause of death with the deference required by AEDPA. Under AEDPA, a federal habeas court may grant relief under 28 U.S.C. § 2254(d)(1) only if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Ninth Circuit failed to respect this additional layer of protection for the state court adjudication, even after this Court remanded the case for further reconsideration under *Brown*. Smith's opposing brief does not explain how the Ninth Circuit's analysis defers to the state court judgment in any way at all.

Brown specifically held that the Ninth Circuit failed to properly apply AEDPA by granting relief on a sufficiency claim based on its resolution of conflicting expert testimony. That is exactly what happened here, and still the Ninth Circuit declined to change its analysis and result in light of *Brown*.

2. Smith claims that unlike the Ninth Circuit had done in *Brown*, the Ninth Circuit in this case did not conduct a "comparative analysis of the evidence," but

simply found that the prosecution experts' opinions as to the cause of death were unsupported. Opp. 27. But, in fact, the Ninth Circuit did compare the prosecution experts' opinions to the defense experts' opinions in reaching its decision, and ultimately found the defense view should prevail. *Smith* v. *Mitchell*, 437 F.3d 884, 887-88, 890 (9th Cir. 2006).

3. Smith also argues that this Court should deny certiorari because this case simply involves a factual dispute. Opp. 28-29. This petition is not, however, merely aimed at vindicating a particular jury's verdict, or a particular state court's decision, or even a particular infant's killing. Nor is it just about correcting "egregious error" in a published Ninth Circuit habeas opinion, or about stemming the threat it poses to the prosecution of child abuse crimes. At this juncture, the central concern of the petition is the Ninth Circuit's repeated failure to follow this Court's directives in this case to correctly apply the law. When the Ninth Circuit again reissued its original opinion, refusing to acknowledge the manifest similarity between this case and *Brown*, the case took on institutional significance.

4. Smith cites *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009) for the proposition that scientific testing is not necessarily neutral or reliable. Opp. 30-31. But there has never been any challenge in this case to the validity of any of the scientific evidence. Rather, the core dispute at trial was about the interpretation of the scientific evidence, and the state appellate court reasonably resolved this dispute in the prosecution's favor on sufficiency review.

5. Smith lastly presents a recent study questioning the reliability of forensic evidence and an article specifically on Shaken Baby Syndrome purportedly casting doubt on the validity of such convictions

generally. While acknowledging that these materials "are not part of the record before the court with regard to the sufficiency issue in this case," Smith argues that this Court should take them into account. Pet. 32-36. But in making this argument, Smith brings this case even closer to *Brown*, where this Court held in the alternative that the new scientific evidence (the *Mueller* report) must not be considered in a sufficiency inquiry because it was not presented at trial. *Brown*, 130 S. Ct. at 672. Like the *Mueller* report, the evidence Smith now raises was not presented at trial and thus should not be considered in a sufficiency inquiry.

Moreover, the law review article on Shaken Baby Syndrome that Smith discusses "'systematically distorts the scientific consensus . . . [and] relies exclusively on the opinions and work of "experts" who derive substantial income from lucrative court testimony on behalf of the accused perpetrators of child abuse,'" according to one child abuse specialist, Dr. Daniel Lindberg. CommonHealth, "The Real Consensus on Shaken Baby Syndrome?" located at http://commonhealth.wbur.org/2010/09/shaken-baby; see Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome in the Criminal Courts*, 87 Wash. U.L. Rev. 1 (2009). Smith's sweeping claim that recent research has been "undermining the foundations of thousands of SBS convictions" (Opp. 33) should not be credited in any event. To the contrary, the scientific underpinnings of Shaken Baby Syndrome continue to be generally accepted within the medical community. See, e.g., Robert M. Reece, *Highlighting Violent and Repetitive Shaking*, 126 Pediatrics 572 (2010); Mattiew Vinchon & Marie Desurmont, *Confessed Abuse Versus Witnessed Accidents in Infants: Comparison of Clinical, Radiological, and Ophthalmological Data in*

Corroborated Cases, 26 Child's Nervous System 637 (2009); see also Letter to the Editor from 106 doctors, *The Evidence Base for Shaken Baby Syndrome*, 328 BMJ 1316 (2004).

6. At bottom, the opposition brief simply defends the decision of the Ninth Circuit as a proper *de novo* consideration of the sufficiency claim. Although that is, in fact, the way the panel approached the issue, *de novo* review is forbidden by AEDPA. Both the Ninth Circuit and the opposition brief simply disregard AEDPA's stringent limits on the power of federal courts to overturn state judgments. And both the Ninth Circuit and the opposition brief fail to come to grips with the implications of the *Brown* analysis, as required by this Court's remand order. Thus, as in *Knowles* v. *Mirzayance*, 129 S. Ct. 1411 (2009), and *Wright* v. *Van Patten*, 128 S. Ct. 743 (2008), this Court's intercession is required.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted

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